(19,268.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 11, 1904.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Delaware, Lackawanna & Western Railroad Company, appellant, and The Commonwealth of Pennsylvania, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
2 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed in supreme court. Middle district. Mar. 2 1904 Olmsted & Stamm.

3 In the Supreme Court of the United States, October Term, 1903.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. —.

The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Delaware, Lackawanna & Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 17th day of February, in the year of our Lord one thousand, nine hundred and four.

EDWARD D. WHITE,
Asso. Justice Sup. Court U. S.

Washington Febr'y 15th 1904.

Service of the above citation accepted. March 1st 1904.

HAMPTON L. CARSON,
Attorney-General, Pa.

3½ [Endorsed:] In the Supreme Court of the United States Delaware, Lackawanna & Western Railroad Company, plaintiff in error *v.* Commonwealth of Pennsylvania defendant in error Citation Filed in supreme court. Middle district. Mar. 2 1904 Olmsted & Stamm.

4 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to-wit:

Copy of Commonwealth Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 213 com. docket of 1900 is contained the following:

Appeal from the settlement of the auditor general and State treasurer.

Dec. 6, 1900. Appeal and specifications of objections filed.

Dec. 15, 1900. Bond filed.

April 13, 1901. Affidavits of F. F. Chambers, sec'y and treas., and W. H. Truesdale, pres't, filed.

April 13, 1901. Agreement of counsel filed reserving for determination of court question of defendant's liability to taxation in respect to capital stock representing coal located outside of Penna.

April 13, 1901. Trial ordered, jury called, came, etc., twelve good and lawful men of Dauphin county, all of whom having been sworn or affirmed do say that they find a verdict in favor of the Commonwealth for two thousand eight hundred seventy-four and sixty-seven one-hundredths ($2,874.67) dollars and costs.

April 29, 1901. Satisfaction filed.

May 28, 1901. Affidavit of F. F. Chambers filed.

May 28, 1901. Opinion of court filed directing judgment to be entered in favor of Commonwealth and against the defendant upon the reserved question for $9,883.71 unless exceptions be filed according to law. Same day defendant's points and answers of the court thereto filed.

May 29, 1901. Defendant's exceptions filed. Same day exceptions overruled and judgment entered in accordance with the opinion heretofore filed. To this ruling defendant excepts, and at its request exception sealed.

May 29, 1901. *Certiorari sur* appeal No. 18, May term, 1901, from supreme court received and filed.

May 29, 1901. Certified.

J. G. DIFFENDERFER,
Prothonotary.

In the Matter of the Account of the COMMONWEALTH OF PENNSYLVANIA against the DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, stated in its caption to be for tax on capital stock for the year ending the first Monday of November, 1899, said tax amounting to $242,350.00, and said account being dated May 9, 1900, a copy of said account being hereunto attached, and made part hereof.

The said Delaware, Lackawanna and Western Railroad Company, having paid or proposing to pay into the State treasury the sum of $100,000 on account, hereby appeals from the balance of said settlement of its account to the court of common pleas of Dauphin county, and files the following specifications of objection thereto, agreeably to the provisions of the act of assembly in such case made and provided:

1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, "not within the
6 territorial limits of the authority levying the tax," and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania.

4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the Constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.

5. In settling accounts for the year 1899 against other transportation companies whose lines of railroad are partly within and partly without the State of Pennsylvania, the accounting officers of the Commonwealth have taxed only that proportion of the entire capital stock which their mileage in Pennsylvania bears to their entire mileage, but although a large part of the appellant's mileage of railroads is in the States of New York and New Jersey, without which railroads and the receipts derived therefrom its capital stock would be much less valuable, nevertheless, in the account appealed from the mileage basis has not been applied and no allowance whatever has been made on account of the ownership or interest of appellant in said railroads in other States, but tax has been imposed upon a valuation equal to the value of its entire capital stock with the amount of its funded debt added thereto and without any deduction or apportionment whatever. An unjust and illegal discrimination is thus made against appellant in violation of section 1 of article IX. of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

6. In settling accounts for the year 1899 against other transportation companies whose lines of railroad are partly within and
7 partly without the State of Pennsylvania, the accounting officers of the Commonwealth have taxed only that proportion of the entire capital stock which their mileage in Pennsylvania bears to their entire mileage, but although a large part of appellant's mileage of railroads is in the States of New York and New Jersey, without which railroads and the receipts derived therefrom its capital stock would be much less valuable, nevertheless, in the account appealed from the mileage basis has not been applied and no allowance whatever has been made on account of the ownership or interest of appellant in said railroads in other States, but tax has been imposed upon a valuation equal to the value of its entire capital stock with the amount of its funded debt added thereto and without any deduction or apportionment whatever. An unjust

and illegal discrimination is thus made against appellant in violation of section 1 of article XIV. of the amendments to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. A portion of the capital stock of appellant is invested in and represents shares of the capital stock of other corporations which are subject to and in their own names pay a tax upon their capital stock, including the shares held by appellant. The taxation of said shares to appellant, or the taxation of its capital stock representing said shares, is in violation of the first section of the act of June 8, 1891, amending section 1 of the act of June 1, 1889, and if enforced would result in double taxation, which is not contemplated nor authorized by any section of said act, or if authorized, is unconstitutional and void because in conflict with section 1 of article IX. of the constitution of Pennsylvania, and with section 1 of article XIV. of the amendments to the Constitution of the United States.

8. The attempted taxation of the corporation appellant upon shares owned by it in other corporations is in direct violation of the act of January 3, 1868, entitled "An act in relation to taxation upon stockholders of corporations."

8 9. The account is erroneous and illegal because therein tax is charged upon accounts and notes and bills receivable held by the company at its office in the city and State of New York against non-residents of the State of Pennsylvania, received by the company in exchange for coal sold and delivered to said non-residents at points without the State of Pennsylvania.

10. The account is erroneous and illegal because it includes tax upon railroad equipment owned by the company and used upon railroads wholly outside the State of Pennsylvania.

11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.

12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Penn-

sylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.

13. A portion of appellant's capital stock is invested in and represents in some instances the whole of the capital stock
9 and in other instances parts of the capital stock of corporations of other States whose franchises are derived from and exercised in said other States, and whose property is there located, wholly outside of the State of Pennsylvania. The shares representing said capital stock are held and owned by appellant at its general office in the city and State of New York. The attempted taxation by Pennsylvania of appellant upon or in respect of the said capital stocks or shares is in violation of a necessary implication of the Constitution of the United States which restricts the taxing power of each State to subjects within its territorial limits.

14. A considerable part of appellant's capital stock is invested in and represents coal lands and other real estate in Pennsylvania upon which appellant is subject to and pays annually all the county, city, borough, school, road, poor and other municipal and local taxes that are paid by owners of other real estate in the taxing localities in which the same is located, the local taxes thus paid by appellant upon real estate in 1899 amounting to more than $150,000. Without said real estate appellant's capital stock would be much less valuable. The account appealed from includes a State tax of five mills assessed upon said real estate, or the value thereof, for which tax there is no authority of law whatever. By the act of February 23, 1866 (P. L. 82), the legislature of Pennsylvania repealed the State tax on real estate theretofore existing, the fourth section of said act providing that "from and after the passage of this act the real estate of this Commonwealth shall be exempt from taxation for State purposes." Since that time there has been no legislation whatever imposing, or attempting, or purporting or intended to impose any State tax upon real estate within this Commonwealth, and the attempt of the Commonwealth to recover such tax from the appellant in the account hereby appealed from, is not only wholly without any statutory or other authority of law, but is an attempt to take the property of appellant without due process of law, and is in violation of section 1 of article XIV. of the amendments to the
10 Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

15. The real estate owned by appellant in Pennsylvania, and which constitutes the bulk of its assets, is subject to and appellant pays thereon the same county, city, borough, school, poor, road and other taxes which are paid upon similar property owned by individuals or partnerships or by corporations not having capital stock, said local taxes paid in 1899 amounting to $—. But real es-

tate in Pennsylvania owned by individuals or by partnerships or by corporations not having capital stock is not taxed for State purposes, and if any act of assembly can be found to warrant the imposition of a tax against this appellant upon real estate in Pennsylvania, or upon capital stock invested in and representing real estate, said act is unconstitutional and void because in conflict with section 1 of article IX. of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

16. The real estate owned by appellant in Pennsylvania, and which constitutes the bulk of its assets, is subject to and appellant pays thereon the same county, city, borough, school, poor, road and other taxes which are paid upon similar property owned by individuals or partnerships or by corporations not having capital stock, said local taxes paid in 1899 amounting to $—. But real estate in Pennsylvania owned by individuals or by partnerships or by corporations not having capital stock is not taxed for State purposes, and if any act of assembly can be found to warrant the imposition of a tax against this appellant upon real estate in Pennsylvania, or upon capital stock invested in and representing real estate, said act is unconstitutional and void because in conflict with section 1 of article XIV. of the amendments to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Harrisburg, Pa., July 7, 1900.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

(S'g'd) By its attorneys, M. E. OLMSTED,
(") A. C. STAMM.

Endorsement: No. 213 Commonwealth docket, 1900.—Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co.—C. S. '99.—Appeal from the settlement of an account by the auditor general and State treasurer.—Filed in the auditor general's office, the 7th day of July, 1900. (S'g'd) P. D. Bricker, for L. G. McCauley, auditor general.—Filed in the prothonotary's office, 6 day of Dec. 1900. (S'g'd) J. G. D., prothonotary.—M. E. Olmsted, A. C. Stamm, attorneys for defendant.

11 *Account.*

Delaware, Lackawanna and Western Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

To tax on capital stock for the year ended the first Monday of November, 1899, based upon the report and papers herewith filed.

Actual value in cash of capital stock, as appraised or valued by the officers of the company, and assessed for taxation, $48,470,000.

Tax at rate of five mills..... $242,350 00

Due Commonwealth..... $242,350 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *May* 9, 1900.

Settled and entered:
(S'g'd) L. G. McCAULEY,
Auditor General.

TREASURY DEPARTMENT,
HARRISBURG, PA., *May* 9, 1900.

Approved:
(S'g'd) JOHN E. STOTT,
For JAMES E. BARNETT,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *May* 10, 1900.

I hereby certify, that the above is a true copy of the original remaining on file in this department.

Witness my hand and seal of office, the day and year aforesaid.

(S'g'd) JNO. A. GLENN,
For L. G. McCAULEY,
[SEAL.] *Auditor General.*

12 *Bond on Appeal.*

Know all men by these presents, that we, The Delaware Lackawanna and Western Railroad Company and Fidelity and Deposit Company of Maryland, of the city of Baltimore, and State of Maryland are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of two hundred eighty-four thousand, seven hundred and $\frac{00}{100}$ dollars ($284,700), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania, or her certain attorney or assigns, to which payment well

and truly to be made we do bind ourselves, and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company, and dated the 30th day of June A. D. 1900.

Whereas, the above bounden Delaware, Lackawanna and Western Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on capital stock for year 1899 amounting to $242,350.00 of which there has been paid or it is proposed to pay $100,000 on a/c leaving a balance of one hundred forty-two thousand three hundred fifty and $\frac{00}{100}$ dollars ($142,350\frac{00}{100}$), said account having been settled by the auditor general on the ninth day of May 1900 and approved by the State treasurer on the ninth day of May 1900.

Now the condition of this obligation is such that if the said Delaware, Lackawanna and Western Railroad Company shall prosecute its said appeal with effect, and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
(S'g'd) By W. H. TRUESDALE, *President.*

Attest:

[Seal of D. L. & W. R. R. Co. affixed.]

(S'g'd) FRED. F. CHAMBERS, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
(S'g'd) By JOSEPH A. FLYNN, [L. S.]
Attorney in Fact.

Attest:
(S'g'd) HUGH M. ALLWOOD, [L. S.]
Attorney in Fact.

[Seal of F. & D. Co. of Md. affixed.]

Signed, sealed and delivered in presence of
(S'g'd) W. R. MARSH.
(") J. R. KINGSLEY.

The security of the above bond is approved:

[Must be signed by a judge of some court in county where sureties reside.]

——— ———.

$1.80 in U. S. inter. revenue stamps affixed cancelled Jun-30, 1900.

12½ [Endorsed:] No. 213 Commonwealth docket, 1900. Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co. C. S. '99. Bond on appeal from the settlement of an account by the auditor general and State treasurer. M. E. Olmsted, A. C. Stamm, attorneys for defendant.

13 STATE OF NEW YORK, }
County of New York, } ss:

On the 30th day of June, in the year 1900, before me, personally came Joseph A. Flynn, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said Joseph A. Flynn, further said that he was acquainted with Hugh M. Allwood, and knew him to be the attorney-in-fact of said company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Joseph A. Flynn.

(S'g'd) ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company in the city of Baltimore, State of Maryland, on the first day of June, 1898, at which was present a quorum of said directors, duly authorized to act in the premises, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven of the Code of Civil Procedure of the State of New York, Henry B. Platt, vice-president, or John W. Wooten, attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt, Joseph A. Flynn
14 and Hugh M. Allwood, attorneys-in-fact of this company in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said John W. Wooten, attorney of the company, or by either one of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, Hugh M. Allwood, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 30th day of June, 1900.

[Seal of Fidelity and Deposit Company of Maryland.]

(S'g'd) HUGH M. ALLWOOD,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement December 30th, 1899.

Resources.		Liabilities.	
Real estate	$600,000 00	Capital stock	$1,500,000 00
Stocks and bonds	1,539,977 00	Surplus and undivided profits	2,088,211 58
Railroad bonds	1,612,430 00	Premium reserve	612,189 33
Net premiums due	116,979 12	Claims in process of adjustment	6,935 72
Cash in bank, etc.	367,918 25	Claims reported: proof not filed	29,967 74
	$4,237,304 37		$4,237,304 37

STATE OF NEW YORK, *County of New York,* } *ss:*

Hugh M. Allwood, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 30th, 1899, to the best of his
15 knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

(S'g'd) HUGH M. ALLWOOD.

Subscribed and sworn to before me this 30" day of June, 1900.

(S'g'd) ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

Endorsement: No. 213, Com'th docket, 1900.—Commonwealth *vs.* Delaware, Lackawanna and Western R. R. Co.—C. S. 99—Appeal bond.—Filed Dec. 15, 1900.—Dec. 15, 1900. The security of the within bond approved. By the court: (S'g'd) John H. Weiss, J.—M. E. Olmsted, A. C. Stamm.

16 *Agreement of Counsel.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA & WESTERN Railroad Company. } No. 213, Com'th Docket, 1900.

And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to
17 and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874.

JOHN P. ELKINS,
Attorney General.
M. E. OLMSTED,
A. C. STAMM.
Attorneys for Defendant.

Endorsement: 213, Com'th docket, 1900. Commonwealth *vs.* Delaware, Lack'a and Western Railroad Company. Agreement of counsel. Filed April 13, 1901. M. E. Olmsted, A. C. Stamm.

Affidavit of Fred. F. Chambers, Sec'y.

In Dauphin County Common Pleas.

COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA & WESTERN Railroad Company. } No. 213, Com'th Docket, 1900.

STATE OF NEW YORK, *City of New York,* } *ss:*

On this 31st day of October, A. D. 1900, before me, a notary public in and for said State, residing in said city, personally appeared Fred. F. Chambers, who, being by me duly sworn according to law, did depose and say as follows, viz:

I am the secretary and treasurer of The Delaware, Lackawanna & Western Railroad Company, the above named defendant. The said company does now, and did in 1899, operate a system of railroads extending from Hoboken, New Jersey, opposite the city of
18 New York, to the city of Buffalo, in the State of New York, running through the State of Pennsylvania and with branches in each of the States of New Jersey, Pennsylvania and New York. The entire system of railroad operated comprises 770.71 miles of main line, of which 176.25 miles are in New Jersey, 200.37 miles in Pennsylvania, and 394.09 miles in New York.

The company owns, and did own during all of the year 1899, real estate in Pennsylvania of the actual value in cash of not less than $8,000,000 in addition to, and not constituting part of its railroad. All of this real estate is, from year to year, assessed and taxed for all purposes which real estate owned by individuals is taxed in the townships, boroughs and cities in which it is located. It was so assessed and taxed for the year 1899, and the county, city, borough, school, road, poor and other taxes paid by the company on said real estate for year amounted to $142,765. These taxes were in addition to taxes assessed against the company for State purposes, and in the assessment and collection of the said county, city, borough, school, road, poor and other local and municipal taxes no deduction or allowance whatever was made on account of any taxes paid or claimed, or to be paid or claimed, by the State for said year.

The company also for said year paid taxes on gross receipts, said taxes amounting to $7,393.97.

On account of tax on capital stock for the year 1899 the company has paid into the State treasury of Pennsylvania the sum of $100,000.

Briefly stated, the original formation of the company's system of railroads was as follows:

The Liggetts Gap Railroad Company was incorporated by a special act of the General Assembly of Pennsylvania, April 7, 1832. By special act of April 14, 1851, its name was changed to Lackawanna and Western Railroad Company. The Delaware and Cobbs Gap Railroad Company was incorporated by special act approved April 7, 1849. The two companies were consolidated under special act of March 11, 1853, into one corporation by the name of the Delaware, Lackawanna and Western Railroad Company,
19 being the present defendant. Into this corporation there was also merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Iron Company; and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company.

By virtue of certain special and general acts of the legislature of New Jersey and New York, the defendant, from time to time acquired an interest in and control of certain railroads and properties in the said States of New York and New Jersey, so that it now operates an extensive system of railroads extending from the city of New York, through the States of New Jersey, Pennsylvannia and New York, to Buffalo, New York, with numerous branches in each of said three States.

The main line of railroad owned by the company in Pennsylvania extends from the Pennsylvania and New York State line, near Great Bend village, to the center of a railroad bridge across the Delaware river near Delaware station, originally constructed jointly by the Delaware, Lackawanna and Western Railroad Company and the Warren Railroad Company, the latter a corporation of New Jersey. The said main line in Pennsylvania is 114.33 miles in length. At the center of the bridge aforesaid it connects with what was formerly known as the Warren railroad, of which the defendant has now a perpetual lease, and which forms part of its main line; and at the Pennsylvania and New York State line, near Great Bend village, it connects with what was formerly known as the Valley railroad, of which the defendant has now a perpetual lease, and which forms part of its main, line; and at the city of Binghamton it connects with the New York Lackawanna and Western railway, of which the defendant has now a perpetual lease, and which forms part of its main line to Buffalo. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg branch, Scranton to Northumberland, 79.66 miles.

Keyser Valley branch, from junction with main line to Keyser Valley, 4.38 miles.

20 Winton branch, Nayaug to Winton, 7.61 miles.

Storr's branch from Winton Junction to Storr's mines, 2.72 miles.

The defendant also operates and substantially owns, or at least has therein such interest as was conveyed by the agreement, a copy of which is hereunto annexed, made part hereof and marked "Ex-

hibit A," a railroad known as the Warren railroad, extending from the center of the railroad bridge across the Delaware river, hereinbefore mentioned, to a point known as the "Junction," in the State of New Jersey, the said road being 18.8 miles in length, all in the State of New Jersey. The Warren Railroad Company, from which said railroad was acquired, never owned any equipment, but the said road has been at all times, and still is, operated with equipment furnished by the Delaware, Lackawanna and Western Railroad Company. It is operated as part of the main line of the Delaware, Lackawanna and Western Railroad Company. The ownership, interest or estate of the Delaware, Lackawanna and Western Railroad Company in the Warren railroad is, and was in the year 1899, of a fair cash value of not less than $1,000,000, in which estimate we do not include the equipment belonging to the Delaware, Lackawanna and Western Railroad Company and used upon the Warren railroad.

The defendant also owns and operates, or has such interest therein as was conveyed by agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit B," the railroad known as the Morris and Essex railroad, extending from Hoboken to Phillipsburg, 119.71 miles, all in New Jersey. The ownership, interest or estate of the Delaware, Lackawanna and Western Railroad Company in the Morris and Essex railroad, as aforesaid, was, in the year 1899, of a fair cash value of not less than $1,000,000.

The Delaware, Lackawanna and Western Railroad Company also operates and owns, or has such interest therein as was conveyed by an agreement, a copy of which is hereunto annexed and marked "Exhibit C," the railroad known as the Valley railroad, ex-
21 tending from the New York and Pennsylvania State line to Binghamton, New York, a distance of 11.11 miles, all in the State of New York. Said ownership, interest or estate was in the year 1899, of a fair cash value of not less than $1,000,000. The said Valley railroad constituted a very important, valuable and profitable part of the company's main line of railroad.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has therein such interest as was conveyed by an agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit D," the railroad known as the New York, Lackawanna and Western railway, extending from Binghamton to Buffalo and Black Rock, a distance of 208.08 miles, all in New York. The said interest, ownership or estate was, in the year 1899, of a fair cash value of not less than $2,000,000. In this valuation we do not include 6.38 miles of railroad construction by a Pennsylvania corporation known as the New York, Lackawanna and Western Railway Company of Pennsylvania, crossing the Pennsylvania and New York State line three times into and through the townships of Waverly and Athens in the county of Bradford, Pa. The New York, Lackawanna and Western Railway Company of New York acquired that road from the Pennsylvania corporation by

agreement of October 23, 1883, and it is included in the lease to the Delaware, Lackawanna and Western Railroad Company.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has such interest therein as was conveyed by an agreement, a copy of which is hereunto annexed, made part hereof and marked "Exhibit E," the railroad known as the Utica, Chenango and Susquehanna Valley Railway, extending from Greene to Utica, 75.66 miles, with branch to Richfield Springs, 21.75 miles, making a total of 97.41 miles, all in New York; the said ownership, interest or estate being, in 1899, of a fair cash value of not less than $1,000,000.

The Delaware, Lackawanna and Western Railroad Company also owns and operates, or has such interest, ownership or estate
22 therein as was conveyed by agreements hereunto annexed, made part hereof and marked Exhibits "F," "G," "H," "I," "J," "K," "L" and "M,", the following additional railroads, viz:

Morris & Essex extension, 1.92 miles, all in New Jersey.

Newark & Bloomfield railroad, 4.24 miles, all in New Jersey.

Passaic & Delaware railroad, 14.11 miles, all in New Jersey.

Chester railroad, 10.04 miles, all in New Jersey.

Passaic & Delaware Extension R. R., 7.41 miles, all in New Jersey.

Cayuga & Susquehanna railroad, 34.41 miles, all in New York.

Greene railroad, 8.10 miles, all in New York.

Oswego & Syracuse railroad, 34.98 miles, all in New York.

It is difficult to put separate valuations upon the ownership or interest by this company in the said eight railroads. They are operated together with other railroads above mentioned in Pennsylvania and in other States as parts of one general system, and while the last mentioned eight roads are not directly as valuable per mile as some of the others, nevertheless, as feeders of the general system and as enabling the company to find market for its anthracite coal production and thus furnishing traffic for the other lines, they are of considerable importance, and the ownership, interest or estates of the company therein estimated as having been in 1899 of the value of, say, $300,000.

The Delaware, Lackawanna and Western Railroad Company also, by reason of the ownership of a majority of the capital stock, controls the—

Syracuse, Binghamton and New York railroad, 80.95 miles, all in New York.

Sussex railroad, 29.52 miles, all in New Jersey.

Lackawanna and Montrose railroad, 10.48 miles, all in Pennsylvania.

Hanover and Newport railroad, 6.81 miles, all in Pennsylvania.

Hopatcong railroad, 0.89 miles, all in New Jersey.

23 wanna and Western Railway Company; the Oswego and Syracuse Railroad Company; the Passaic and Delaware Railroad Company; the Utica, Chenango and Susquehanna Valley Railway Company, and Greene Railroad Company.

In addition to the railroads leased to defendant in perpetuity and operated by it as part of its own system and constituting part of its main line, as already shown, the defendant owns a controlling interest in, and through its own officers operates the Syracuse, Binghamton and New York railroad, extending from Geddes, N. Y., to Binghamton, N. Y., about 81 miles. The total capital stock of the Syracuse, Binghamton and New York Railroad Company is $2,500,000, of which amount the defendant held and owned in 1899, $1,901,900. This road connecting with the Delaware, Lackawanna and Western railroad at Binghamton, constitutes an important feeder and throws a great deal of freight and passenger traffic upon defendant's railroad, and is, moreover, exceedingly profitable in itself, paying annually eight per cent. in divi-

[Matter between rules improperly placed in copy.]

The railroad owned by the defendant in Pennsylvania was constructed primarily for the purpose of transporting to various markets, chiefly of said State, the product of anthracite coal lands in Pennsylvania. The company is authorized by its charter to own coal lands and to mine and sell, and also to purchase and sell, coal. It is largely engaged in mining and selling coal. At least three-fourths of all the coal transported over its road consists of its own anthracite coal, and the extent to which it thus transports anthracite coal over its roads in Pennsylvania and elsewhere depends very largely on the extent to which it can find market for said coal at points beyond the limits of Pennsylvania.

The acquisition by it of the leases aforesaid of railroads in New Jersey and New York has enabled it very largely to extend its markets for anthracite coal, thus enabling it not only to employ and pay a very large additional force of men in mining said coal *and* also to largely increase the traffic of the railroads wholly owned by it in Pennsylvania. The leases aforesaid are valuable to defendant not only by reason of the operation of the leased roads themselves, but

24 because their control by the defendant makes the roads owned by it in Pennsylvania much more valuable and profitable because of the large increase of tonnage thus thrown upon them. The most of the leases above recited were secured in December, 1868, and in 1869, and in the spring of 1870. The New York, Lackawanna and Western was not secured until October 2, 1888. The importance of the earlier leases is shown by the fact that whereas in 1868 the total amount of anthracite coal shipped over the defendant's road in Pennsylvania was 1,772,414 tons, in 1870 there were shipped 2,870,450 tons, all of which passed over the roads of

the company in Pennsylvania, as well as over the leased lines in other States.

After the acquisition of the New York, Lackawanna and Western road, by perpetual lease in 1882, thus extending defendant's main line through to Buffalo, which point, next to the city of New York, is the most important market for anthracite coal, the defendant's tonnage further increased so that during the year ending June 30, 1897, it transported 6,905,109 tons of anthracite coal, and during the year ending June 30, 1899, 7,043,624 tons. The acquisition of the New York, Lackawanna and Western road by lease also threw upon the company's roads in Pennsylvania a very considerable additional traffic in grain and other agricultural products. In 1881, the year before the lease was acquired, the total amount of agricultural products transported by defendant was 289,984 tons, whereas during the year ending June 30, 1897, the amount transported was 1,029,347 tons, and during the year ending June 30, 1899, 1,279,275 tons, over one-half thereof being grain coming upon defendant's railroad in Pennsylvania, from its leased road, the New York, Lackawanna and Western railway, and when leaving Pennsylvania, carried over its leased line in New Jersey to tide-water at New York.

Defendant's transportation of merchandise from manufacturers has also been more than doubled since the acquisition of the New York, Lackawanna and Western lease.

Defendant's transportation of passengers upon its roads in
25 Pennsylvania has been greatly increased by its acquisition of the leased roads aforesaid. Thus, in 1897, there were transported upon its roads in Pennsylvania passengers of all classes, 187,533; through passengers on the main line amounting only to 4,417. The acquisition of the leases in 1868, 1869 and 1870 increased the passenger traffic, which was then very small, about twenty-five per cent. In 1881, the last year before the acquisition of the New York, Lackawanna and Western lease, the total number of passengers transported was 742,624, of which 20,171 were through passengers. The total passenger mileage—that is to say the total number of passengers carried one mile in Pennsylvania—was 10,965,077. In 1883, the first year after the acquisition of the said lease, the total number of through passengers was 315,964, and the total number of passengers carried one mile in Pennsylvania was 27,533,100. The total number of passengers carried in that year was 939,404. After the New York, Lackawanna and Western railroad had been fully completed and equipped, the defendant was enabled to run through fast passengers trains from New York to Buffalo, passing over its leased lines in New Jersey and New York and its owned lines in Pennsylvania, thereby increasing its passenger traffic so that during the year 1899 the total number of passengers carried was 12,969,893; the total number of passengers carried one mile in Pennsylvania was 42,641,382, and upon the entire system over 260,274,000, a result which, of course, would never have been accomplished except for

the passenger traffic furnished the company's road in Pennsylvania from the leased lines in New York and New Jersey.

The defendant's coal property in Pennsylvania is also, of course, made much more valuable by reason of the company's control, by perpetual lease, of the railroads in New York and New Jersey forming part of its through line. If defendant did not own the leasehold interests, which it has acquired as aforesaid in railroads in New York and New Jersey, it would have to transport its coal to market over railroads owned or controlled largely by its rivals in the anthracite coal business, and would be at great disadvantage, both as to rates of transportation and terminal facilities, as well
26 as in the number and importance of the points for the marketing of its coal.

Under all the circumstances, the aggregate valuation of $6,300,000 hereinbefore placed upon its leases, is believed to be very conservative and low. The defendant would not surrender the said leases for that amount, and if by any means it should be deprived of them, the property owned by it in Pennsylvania would not be nearly so valuable and its capital stock would depreciate in value more than $6,300,000. The actual value in cash of the company's capital stock was that much greater than it would have been had the company not owned the said leasehold interests in railroads in New York and New Jersey.

The construction of the leased roads was promoted by the Delaware, Lackawanna and Western Railroad Company, which loaned its own funds and its own credit to bring about their construction, and it still held on November 1, 1899, capital stock in them as follows, viz:

Morris & Essex Extension R. R. Co.	$42,300 00
Newark & Bloomfield R. R. Co.	97,450 00
Passaic & Delaware R. R. Co.	109,350 00
Valley R. R. Co.	5,000 00
New York, Lackawanna & Western Ry Co.	70,400 00
Greene R. R. Co.	400 00
Utica, Chenango & Susq. Valley Ry Co.	20,000 00
Warren R. R. Co.	10,000 00

The average actual value of all of these stocks is not less than their par value.

The defendant also owned $2,000,000 of the bonds of the New York, Lackawanna and Western Railway Company, and $100,000 of the bonds of the Chester Railroad Company. It has also assumed all the liabilities and guaranteed the principal and interest of all the bonds of the Morris and Essex Railroad Company, amounting to $24,269,000; of the New York, Lackawanna and Western Railway Company, amounting to $22,000,000; and most, if not all, of the bonded debt of the other leased companies.

27 Either W. H. Truesdale, the president of the Delaware, Lackawanna and Western Railroad Company, or some other

officer of the defendant company, is the president of the Morris and Essex Railroad Company; the New York, Lacka-

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dends. From that source the defendant received in 1899 $152,152 of dividends, which went into its own treasury, swelling its own income, and going, of course, into the funds from which it paid dividends to its own stockholders, which dividends increased the market value of defendant's own capital stock. Defendant's secretary and treasurer hold similar offices in the Syracuse, Binghamton and New York Railroad Company, and the general office of the said company is in the general office of the defendant company at No. 26 Exchange place, in the city of New York. Defendant's interest or ownership in said railroad is of the value of not less than $2,860,000.

[Matter between rules improperly placed in copy.]

In a few instances the equipment of the roads operated by defendant in New York and New Jersey, as above set forth, was acquired with the roads, but the most of them have no equipment whatever, except as furnished by defendant. The total equipment owned by the Delaware, Lackawanna and Western Railroad Company in 1899, not including any which had been acquired with roads leased to, and operated by it, was inventoried at, and was of the actual value of $7,891,217. This equipment was and is used upon the entire system in New Jersey and New York, as well as in Pennsylvania, interchangeably with the equipment of such leased or controlled roads mentioned as possessed some equipment of their own. That is to say, the leased equipment of roads in other States was used in Pennsylvania, and that owned by the defendant was used in other States, as well as in Pennsylvania. Determined by the proportion which the number of miles operated and equipped by the company in Pennsylvania bears to the whole number of miles operated and equipped by it, the value of the equipment owned and used in Pennsylvania was $1,986,219.

In the year 1899 the Delaware, Lackawanna and Western Railroad Company owned shares of stock in corporations of the
28 State of Pennsylvania, subject to and paying a tax upon capital stock, imposed by the twenty-first section of the revenue act of 1889, as amended by the acts of 1891 and 1893, as follows, viz:

Name of company.	No. of shares.	Par value of shares.	Total par value.
Lackawanna Iron & Steel Co.	258	$100	$25,800
Lackawanna Iron & Coal Co.	43	100	4,300
Providence Gas & Water Co.	1,694	100	169,400
Bangor Union Slate Co.	175	100	17,500
Lackawanna & Montrose R. R. Co.	1,592	50	79,600

The defendant company also owned real estate outside of Pennsylvania in 1899 of the value of $1,195,907, said real estate consisting of lots of ground and buildings and structures thereon located in the States of New York, New Jersey and Illinois.

Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was
29 approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York.

In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.

Although the Delaware, Lackawanna and Western Railroad Company was originally chartered under the laws of Pennsylvania, it has received authority to transact business and hold land in New Jersey and also transact business and hold land — have its general office and place of business in the city and State of New York, said authority having been granted by special acts of the legislature of said States. It is also authorized, by virtue of a special act of the General Assembly of Pennsylvania, to maintain its general office and place of business and hold its stockholders' meetings in the city of

New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. In pursuance of authority conferred by legislative enactments of the said two States, the company's general office and place of business, including its treasury, is, and was in 1899 and for many years prior thereto, located at No. 26 Exchange place, in the city of New York. Its president, secretary and treasurer and other general officers are non-residents of Pennsylvania and reside in the city of New York or its vicinity, and have their offices in the company's general office at No. 26 Exchange place, as aforesaid.

30 During the year 1899 the company held in its treasury at 26 Exchange place in the city of New York and State of New York, bonds of other corporations as follows:

Name of corporation.	Par value of bonds.	Actual value of bonds as nearly as can be ascertained or estimated.
Chester railroad	100,000	$100,000
Kewaukee Green Bay & West. R. R	1,000	1,000
New York, Lack. & Western Ry	2,000,000	2,500,000
Lack. Iron & Steel Co	12,000	12,000
Syracuse & Baldwinville Ry	84,000	No actual value

Also certificates of stock in other corporations as follows:

Name of corporation.	Par value of stock.	Actual value of stock as nearly as can be ascertained or estimated.
Morris & Essex Extension R. R	42,300	$43,300
Newark & Bloomfield R. R	97,450	116,940
Passaic & Delaware R. R	109,350	109,350
Warren R. R	10,000	18,000
Valley R. R	5,000	6,000
New York, Lack. & West. Ry	70,400	91,520
Greene railroad	400	400
Utica, Che. & Susq. Valley Ry	20,000	31,000
Syr., Bing. & New York R. R	1,901,900	3,233,230
Green Bay & Western R. R	3,540	No actual value
Lack. Iron & Coal Co	4,300	4,300
Lack. Iron & Steel Co	25,800	25,800
Prov. Gas. & Water Co	169,400	169,400
Lack. & Montrose R. R	79,600	59,700
Hopatcong R. R	10,000	10,000
Sussex R. R	15,650	7,825
Bang. Union Slate Co	17,500	No actual value

31 Also notes and bills receivable of the aggregate value of $93,160.

Also accounts receivable of the aggregate value of $2,489,655.

All of the aforesaid stocks, bonds, notes, bills receivable and accounts receivable were physically located, held and owned in the general treasury of the company at 26 Exchange place, in the city of New York, during the year 1899, and were not at any time within the Commonwealth of Pennsylvania. They were also taxed directly or indirectly in the city and State of New York.

The company also owned in 1899, 2 tugs, 59 coal barges and 14 schooner barges, registered and used wholly outside the State of Pennsylvania, of the aggregate value of $498,700.

The business of the company is of an interstate character, at least eighty per cent. of all the freight transported over its railroad being carried from Pennsylvania into other States, or from other States into Pennsylvania, or from points in other States, passing through Pennsylvania, to points in other States, or from points in other States to points in other States, without touching Pennsylvania at all.

Since 1892 there have been actually paid into the State treasury of Pennsylvania by this company $967,500.

The company has paid into the State treasury on account of tax on capital stock for the year 1899 the sum of $100,000.

All of which is correct and true according to the best of my knowledge, information and belief.

(S'g'd) FRED. F. CHAMBERS.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings Co.

Certificate filed in New York.

[SEAL.]

32 *Affidavit of W. H. Truesdale, President.*

STATE OF NEW YORK, } ss:
City of New York, }

On this 31st day of October, A. D. 1900, before me, a notary public in and for said State, residing in said city, personally appeared W. H. Truesdale, who, being by me duly sworn according to law, did depose and say as follows, viz:

I am the president of The Delaware, Lackawanna and Western Railroad Company, the above-named defendant. I am familiar with its property, business and affairs. I have carefully read the foregoing sworn statement of Mr. Fred. F. Chambers, the secretary of the company, and fully concur therein and desire that the same may be con-

sidered with like effect as if the contents thereof were herein recited and set forth at length.

(S'g'd) W. H. TRUESDALE.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings County.

Certificate filed in New York county.
[SEAL.]

Endorsement: No. 213, Com'th docket, 1900.—Com. vs. Delaware, Lackawanna & Western Railroad Co.—C. S. '99.—Affidavits of Fred F. Chambers, sec'y and W. H. Truesdale, pres't. Filed April 13, 1901.—M. E. Olmsted, A. C. Stamm.

33 *Verdict.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA vs. DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 213. Com'th Docket, 1900.

Verdict.

Tax	$111,250.00
Less 5 mills on coal, $1,702,443.00	8,512.21
	102,737.79
Less payment on account	100,000.00
	2,737.79
Add att'y general's commission of 5 per cent	136.88
Verdict for	$2,874.67

H. C. HOUTZ, *Foreman.*

4/13/01.

Satisfaction.

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA vs. DELAWARE, LACKAWANNA & WESTERN RD. CO. } No. 213, Commonwealth Docket, 1900.

Received April 29, 1901, of above defendant the sum of two thousand eight hundred eighty-six dollars and sixty-seven cents *dollars*

($2886.67) in full of debt, interest, attorney general's commission and docket costs on above stated judgment, and the prothonotary is hereby directed to mark the same satisfied.

FREDERIC W. FLEITZ,
Deputy Attorney General.

34 *Additional Affidavit of Fred. F. Chambers.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
DEL., LACKA. & WESTERN R. R. Co. } No. 213, Com'th Docket, 1900.

STATE OF NEW YORK,
City of New York, } *ss:*

On this 25th day of May, A. D. 1901, before me, a notary public in and for said State and residing in said county, personally appeared Fred. F. Chambers, being by me duly sworn according to law, who did depose and say as follows:

I am the secretary and treasurer of the Delaware, Lackawanna and Western Railroad Company. Referring to taxes mentioned in my former affidavit in the above entitled case, I desire to add that they have been paid, I believe. The company is not contesting, but on the other hand concedes the rights of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid.

All of which is correct and true to the best of my knowledge, information and belief.

(S'g'd) FRED. F. CHAMBERS.

Sworn and subscribed before me the day and year aforesaid.

LUDWIG R. MILLER,
Notary Public Appointed from Kings County.

Certificate filed in New York county.
[SEAL.]

Endorsement: No. 213, Com'th docket, 1900.—Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co.—Affidavit of Fred. F. Chambers, secretary & treasurer.—Filed May 28, 1901.—M. E. Olmsted, A. C. Stamm.

35 *Judgment of the Court on Reserved Question.*

The judgment upon the verdict of the jury has been paid in full. A question as to tax on capital stock representing coal stored at points in other States, was, by agreement of the parties, withdrawn from the jury, and submittted to the court as if under the act of April 22, 1874, to find both the facts and the law, and judgment was entered by the court upon the reserved question as follows, viz:

Tax on coal	8,512 21
Interest at 12% from July 8, 1900, to May 22, 1901	945 89
Attorney general's commission	425 61
Total	$9,883 71

Findings of Fact and Opinion of the Court of Common Pleas.

By the COURT: This case arose upon an appeal by defendant from an account for tax on capital stock for the tax year 1899, said account amounting to $242,350. Certain questions raised by the appeal having, by agreement of counsel, been withdrawn from the jury and submitted for the determination of the court without a jury, as if under the act of April 22, 1874, we find the following facts:

1. The Delaware, Lackawanna and Western Railroad Company was organized under the special act of the General Assembly of Pennsylvania approved March 11, 1853, by the consolidation of the Liggetts Gap Railroad Company, incorporated under the act of April 7, 1832, whose name was, by the act of April 14, 1851, changed to Lackawanna and Western Railroad Company, and the Delaware and Cobbs Gap Railroad Company, incorporated by the act of April 7, 1849. Into the Delaware, Lackawanna and
36 Western Railroad Company as formed by the merger of the Lackawanna and Western Railroad Company and the Delaware and Cobbs Gap Railroad Company, were merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Coke Company, and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company. The company, as authorized by special act of Pennsylvania legislature, has its general office and treasury in the city and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy and sell coal and convey the same to market; and, in addition, to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The

proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the auditor general made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania in New York, Illinois and other States of the value of $1,702,443, and, as already stated, no deduction was made by the auditor general in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

2. There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the attorney general, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz:

"And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon
$1,702,444, being the value of coal held and owned at points
37 in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874."

3. The case having been submitted to the jury, a verdict was rendered as follows, viz:

'Tax	$111,250 00
Less five mills on coal $1,702,443.00	8,512 21
	$102,737 79
Less payment on account	100,000 00
	$2,737 79
Add attorney general's commission of 5 per cent	136 88
Verdict for	$2,874 67"

The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the court as aforesaid of the defendant's liability to taxation with
38 respect to capital stock invested in coal located outside of Pennsylvania.

4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

"Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instances, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois, and other

States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the city and State of New York.

"In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after,
39 its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale."

5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business and to hold its stockholders' meeting, in the State of New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. The company is taxable upon the *value* of the property represented by its capital stock, and not upon the *amount* of the latter.

Being a tax on property it follows that the State cannot tax that part or portion of its property, which is permanently located beyond her territorial limits, of which is "intended permanently to serve any corporate purpose of its owner."

The coal was here as real estate, until it was mined. It became, and remained, personal property from that time. As such it entered into the value of capital stock. It was transported to points in other States for temporary storage and immediate sale. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

40 The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

It is this itinerant trait which likens the case to the dredges, tugs and scows in Commonwealth *vs.* American Dredging Company, 122 Pa., 386, employed beyond, but taxed within, the boundaries of this

State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuit or business of the owner. They may with propriety be said to be located there permanently.

But coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related.

It is testified to and not contradicted, that the coal for the tax year 1899 was intended to and did become part of the general mass of property in the other States, "and the property is there annually taxed upon, or in respect of, the same, and was so taxed in 1899."

All taxes assessed against the company for 1899 in other States on coal located there have been paid, according to what the secretary of the company says he believes and so far as he can now recall, but it does not appear that said taxes were not for local or municipal purposes and not for State purposes, and it does appear that the taxes laid were paid without contest.

The company may thrive better by resisting the collection of a tax on coal in those States into which it has been shipped,
41 than here, where the property in question is accorded protection, and where it enters into the value of the capital stock and is primarily taxable.

Taxation there would not suspend the right to tax property located here and forming part of a mass which, as well before severance from the land as after, and of course, prior to its transportation elsewhere, entered into and affected the value of the capital stock, and which was so deposited elsewhere, for a mere temporary and not a permanent, purpose. Primary jurisdiction to tax the coal attached here and its voluntary carriage into other States for sale, does not detach it, even if by law of those States it is again taxable there.

What the Supreme Court in Brown *vs.* Houston, 114 U. S. 622, decided, as we understand it, is, that a tax laid by the State of Louisiana, pursuant to a general law, upon coal transported into that State from Pennsylvania, where a tax was theretofore laid upon capital stock representing the same property and paid for the same year was not violative of the provisions of the Constitution of the United States relative to duties on imports or exports and regulating commerce among the several States.

Mr. Justice Bradley, p. 623, says: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination, and was

up for sale." It was "an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject."

There was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the Commonwealth, and never subject to the visatorial power of the auditor general or any other authority.

42 But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition.

The company is required not only to estimate and appraise its capital stock at its actual value in cash between the first and fifteenth days of November of each year, but it must be not less "than the average price the said stock sold for during the year ending with the first Monday of November," 1899, "and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus of sinking fund."

After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing, to-morrow—fugitive ever until it reaches the torch.

By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

This rule is also in accord with the dictates of equity, for by it the value of the product as represented by the capital stock, can be ascertained with almost mathematical exactness.

In Commonwealth *vs.* Railroad Co., 145 Pa., 104, the Supreme Court, commenting upon the case of Commonwealth *vs.* American Dredging Company, 122 Pa., 286, says: "The dredges which were the subjects of the controversy were taxable at the situs of the company, for the reason that, although wholly used outside of the Commonwealth, they did not remain in any one place long enough to render them liable to taxation there."

43 Having reached the conclusion that the shipment of the coal into other States for the purpose of sale does not give it the character of permanence there, so as to exempt it from taxation here, and being also of the opinion that even if the testimony had actually disclosed the fact that the coal shipped into the other States was taxed for the same year prior to its disposition and the tax paid

by the company, it would still be taxable by this State, there remains only the duty to direct judgment to be entered upon the reserved question in favor of the Commonwealth and against the defendant company for the sum of $8,512.21 eight thousand five hundred and twelve and twenty-one one-hundredths dollars, with interest from July 8, 1900, unless exceptions are filed as required by law, as follows, viz:

Tax on coal	$8,512 21
Interest at 12% from July 8, 1900, to May 22, 1901	945 89
Attorney general's commission	425 61
	$9,883 71

(S'g'd) JOHN H. WEISS, *J.*

May 28, 1901.

Endorsement: No. 213, Com'th docket, 1900.—Com'th of Penna. *vs.* Delaware, Lackawanna and Western Railroad.—Tax on capital stock for 1899.—Opinion.—Filed May 28, 1901.

Defendant's Points.

Defendant respectfully submits the following points:

1. The tax on capital stock, imposed by the statutes upon which the Commonwealth's claim is based, is a tax upon the property and assets of the corporation.

2. If, for any reason, a portion of the property and assets of the corporation are not subject to taxation in Pennsylvania, a proportionate deduction must be made from the valuation upon which the tax on capital stock is imposed.

3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.

44 4. The taxation of coal, or of capital stock representign coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

(") M. E. OLMSTED,
(S'g'd) A. C. STAMM,
Attorneys for Defendant.

Answers to Defendant's Points.

1. Affirmed.

2. Affirmed if the whole capital stock has been valued in the report and appraisement made to, and by the auditor general.

3. Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.

4. Refused for reasons given in the general opinion.

By the court,

(Signed) JOHN H. WEISS, *J.*

May 28, 1901.

Endorsement: No. 213, Com'th docket, 1900—Com'th of Penna. vs. Delaware, Lacka. & Western R. R. Co.—Defendant's points and answers of the court thereto.—Filed May 28, 1901.—M. E. Olmsted, A. C. Stamm.

Defendant's Exceptions.

This case having been heard by the court without the intervention of a jury as if under the act of April 22, 1874 (P. L. 109), as provided in said act, defendant files the following exceptions to the decision of the court, viz:

1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

"1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock
45 of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz:

"2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interest in railroads and railway equipment, real

estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

3. The learned court erred in not sustaining the third objection specified in defendant's appeal, said objection being as follows, viz:

"3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, 'not within the territorial limits of the authority levying the tax,' and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania."

46 4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States."

5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

"11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits."

6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Penn-

sylvania in the account hereby appealed from, is in violation
47 of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits."

7. The learned court erred in its answer to the third point submitted by defendant, said point and the answer thereto being as follows, viz:

"3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania."

Answer: "Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused."

8. The learned court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz:

"4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

Answer: "Refused for reasons given in the general opinion."

9. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71.

10. The learned court erred in not directing judgment to be entered in favor of the defendant and against the Commonwealth.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

By its attorneys,
(S'g'd) M. E. OLMSTED,
(") A. C. STAMM.

Order of Court Overruling Defendant's Exceptions.

And now, May 29, 1901, the within exceptions are overruled and judgment is directed to be entered in accordance with the opinion heretofore filed. To this ruling defendant excepts and at its request exception sealed.

By the court:
(S'g'd) JOHN H. WEISS, *J.*

Endorsement: No. 213, Com'th dkt., 1900. Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna and Western Railroad Co. Filed May 29, 1901. Defendant's exceptions. M. E. Olmsted, A. C. Stamm.

48 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21" Monday following the 1" Monday of Janurary, A. D. 1901.

Present: Honorable Henry Green, chief justice; J. B. M'Collum, James T. Mitchell, John Dean, D. Newlin Fell, J. Hay Brown, and S. L. Mestrezat, justices, and William Pearson, prothonotary of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district, to May term 1901, No. 18, it is contained as follows, to-wit:

Docket Entries.

COMMONWEALTH OF PA. vs. DELAWARE, LACKAWANNA & WESTERN R. R. Co. (Appellant).	No. 213, Com. Docket of 1900.

Certiorari sur appeal to common pleas of Dauphin county.

May 29" 1901.—App. and aff. filed.
Eo die, exit writ, r't'ble *sec. reg.*
June 1" 1901.—Record filed.
June 3" 1901.—Assignments of error filed.
June 4" 1901.—Continued.
June 2" 1902.—Argued.
Oct. 13" 1902.—Argument ordered, *per curiam.*
Argued June 1" 1903.
49 July 9" 1903.—Judgment affirmed per Brown, J.
July 15" 1903.—Record remitted.

March 2" 1904.—Petition for writ of error to Supreme Court of the United States.

Writ of error from said court, allowed by Hon. E. D. White, associate justice of said court and citation from said Hon. E. D. White, accepted by Hon. Hampton L. Carson, attorney general of Pennsylvania, filed.

March 2" 1904.—Writ of error bond in sum of $19,767,42 filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary.

50 *Affidavit and Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PA., Plaintiff, vs. DELAWARE, LACKAWANNA & WESTERN R. R. Co., Defendant and Appellant. } No. 213, Com. Docket of 1900. Court of C. P. of the County of Dauphin.

Enter appeal on behalf of defendant from the judgment of the court of common pleas of the county of Dauphin

To William Pearson, proth'y sup. ct. middle district.

M. E. OLMSTED.

STATE OF PENNSYLVANIA, *County of Dauphin,* } *ss:*

M. E. Olmsted attorney for appellant being duly sworn saith that the above appeal is not intended for delay, but because he firmly believes that his client suffered injustice by the judgment from which he desires to appeal.

[Seal of Supreme Court of Pa., Middle District.]

M. E. OLMSTED,
Attorney for Delaware, Lackawanna & Western R. R. Co.

Sworn and subscribed before me this 29 day of May A. D. 1901.

WILLIAM PEARSON,
Prothonotary.

51 *Writ of Certiorari from Supreme Court of Pa.*

MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

[Seal of Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

We being willing, for certain causes, to be certified of the appeal of the Delaware, Lackawanna & Western R. R. from the judgment of said court in suit of Commonwealth of Pa. said appellant to No. 213 Com. docket of 1900—before you or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday following

1st Mon. of Jan. 1901, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, the Honorable J. B. M'Collum, doctor of laws, chief justice of our supreme court, at Harrisburg, the 29th day of May, in the year of our Lord, one thousand nine hundred and one, and of the Commonwealth the 125th.

WILLIAM PEARSON,
Prothonotary.

52 Endorsement.

The record and process, with all things touching the same, so full and entire as before us, they remain to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JOHN H. WEISS. [L. S.]
—— ——. [L. S.]
—— ——. [L. S.]

[Endorsed:] 213 Com'th dk. 1900 No. 18 May term, 1901 Supreme court, middle district. Commonwealth of Pa. *vs.* Delaware, Lackawanna & Western R. R. Co. appellant Certiorari to the court of common pleas for the county of Dauphin Returnable the 21 Mon. foll. 1 Monday of Jan. 1901 "Rule on the appellee to appear and plead on the return day of the writ." N. B.—10 days' notice to the parties or their counsel below necessary to compel an appearance. Filed May 29 1901

53 *Specifications of Error.*

I. The learned court erred in overruling defendant's first exception, which exception was as follows, viz.:

"1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz.:

"'1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if

the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

II. The learned court erred in overruling defendant's second exception, which exception was as follows, viz.:

"2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz.:

"'2. Appellant's system of railroads is partly in Pennsylvania and party in other States. In the roads in other States be-
54 longing to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

III. The learned court erred in overruling defendant's third exception, which exception was as follows, viz:

"3. The learned court erred in not sustaining the third objection specified in defendant's appeal, said objection being as follows, viz:

"'3. The account hereby appealed from charges tax upon property, or upon capital stock representing property, "not within the territorial limits of the authority levying the tax," and is for that reason, as well as others, in violation of section 1 of article IX. of the constitution of Pennsylvania.'"

IV. The learned court erred in overruling defendant's fourth exception, which exception was as follows, viz:

"4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"'4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective proportons of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.'"

55 V. The learned court erred in overruling defendant's fifth exception, which exception was as follows, viz:

"5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

"'11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.'"

VI. The learned court erred in overruling defendant's sixth exception, which exception was as follows, viz:

"6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"'12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.'"

VI*a*. The learned court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of article I., section 8, clause 3, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

VII. The learned court erred in overruling defendant's seventh exception, which exception was as follows, viz:

"7. The learned court erred in its answer to the third point submitted by defendant, said point and the answer thereto being as follows, viz:

56 "'3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.'"

"Answer: 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.'"

VIII. The learned court erred in overruling defendant's eighth exception, which exception was as follows, viz.:

"8. The learned court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz.:

"'4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

"Answer: 'Refused for reasons given in the general opinion.'"

IX. The learned court erred in overruling defendant's ninth exception, which exception was as follows, viz.:

"9. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71."

X. The learned court erred in overruling defendant's tenth exception, which exception was as follows, viz.:

"10. The learned court erred in not directing judgment to be entered in favor of the defendant and against the Commonwealth."

XI. The learned court erred in directing judgment to be entered in favor of the Commonwealth and against the defendant for $9,883.71.

XII. The learned court erred in not directing judgment to be entered in favor of defendant.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

(S'g'd) By its attorneys, M. E. OLMSTED,
(") A. C. STAMM.

Endorsement: Com. of Pa. *vs.* D., L. & W. R. R. Co. In supreme court of Pa. middle district. Specifications of error. Filed in supreme court June 3, 1901.

57 *Order of Court Directing Re-argument.*

COMMONWEALTH OF PENNSYLVANIA
v.
DELAWARE, LACKAWANNA & WESTERN RAILROAD Company and Pennsylvania Coal Company.
} Nos. 18, 19, and 20. May Term, 1901.

Appeals from C. P., Dauphin.

Per Curiam:

We permitted these three cases to be submitted on the paper books under the impression, at the time the application was made to so submit them, that the facts were identical with those in Com-

monwealth *v.* Pennsylvania Coal Company, 187, Pa., 551. An examination of the paper books having disclosed a difference in the facts, it is ordered that these appeals be placed upon the argument list for the middle district at May term, 1903.

Endorsements: 18, 19 and 20, May term, 1901. Commonwealth of Pennsylvania *v.* Delaware, Lackawanna & Western Railroad Company and Pennsylvania Coal Company. Appeals from C. P. Dauphin. Argument ordered: *Per curiam.* Filed Oct. 13, 1902. Supreme Court. M. D.

58 *Opinion of the Supreme Court of Pennsylvania.*

COMMONWEALTH OF PENNSYLVANIA *v.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 18. May Term, 1901.

Appeal from C. P., Dauphin.

BROWN, *J.:*

This case is not distinguishable from Commonwealth *v.* Penna. Coal Co., 197 Pa., 551, and is controlled by it. Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. A sufficient answer to this is the court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax. When shipped out of the State it is for the purpose of sale, and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. "It is not a thing," as the learned judge below very properly said, "used
59 in the prosecution of the business of the company." The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business,

This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers.

Judgment affirmed.

Argued June 1, 1903.

M. E. Olmsted for appellant.

Hon. Hampton L. Carson for appellee.

Present: All justices except McCollum.

Opinion filed July 9, 1903.

[Endorsed:] No. 18. May term 1901. Com. of Pa., *v.* Del. Lack. & West'n R. R. Co.

60 COMMONWEALTH OF PENNSYLVANIA, *County of Dauphin,* } *sct:*

I, William Pearson, prothonotary of the supreme court of Pennsylvania, in and for the middle district thereof, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth of Pennsylvania *vs.* Delaware, Lackawanna & Western R. R. Co. at No. 18 of May term, 1901 as full, entire and complete as the same remains on file in the said supreme court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the prothonotary of said court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Harrisburg, in the county of Dauphin, in the said middle district of Pennsylvania, this 13th day of July in the year of our Lord one thousand nine hundred and three.

[Seal of Supreme Court of Pennsylvania, Middle District.]

WILLIAM PEARSON,
Prothonotary.

60½ [Endorsed:] No. 18 May term, 1901. Commonwealth of Penna. *vs.* Delaware, Lackawanna & Western R. R. Co. appellant Certificate of opinion

61 *Remittitur.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the judges of the court of common pleas for the county of Dauphin, Greeting:

Whereas, by virtue of our writ of certiorari from our supreme court of Pennsylvania in and for the middle district, returnable in the said

court on the 21st Monday following 1st Monday of January in the year of our Lord one thousand nine hundred and one, a record was brought into the same court of a judgment rendered against The Delaware, Lackawanna & Western Railroad Company appellant, at the suit of The Commonwealth of Pennsylvania appellee, and it was so proceeded in our supreme court that the said judgment was affirmed and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of assembly in such cases made and provided,) ordered by the said supreme court to be remitted to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness, the Hon. J. B. M'Collum chief justice of our supreme court at Harrisburg, the 10th day of July in the year of our Lord one thousand nine hundred and three

WILLIAM PEARSON,
Prothonotary.

61½ [Endorsed:] 213 Com'th dk. 1900 No. 18 May term, 1901 Supreme court of Pennsylvania. Commonwealth of Penna. *vs.* —— —— Remittitur to —— county.

Costs.

(Paid by —— ——)

Prothonotary, (—— ——)	$12 00
Attorney, (—— ——)	3 00
Amount	$15 00

62 *Return to Writ of Error from Supreme Court of the United States.*

And now here on this day, to-wit March 2", 1904, the said, The Delaware, Lackawanna & Western Rail Road Co. produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the said writ, viz: February 17". 1904 which writ of error is hereunto annexed.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid

rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

63 *Petition for Writ of Error.*

To the Honorable Edward D. White, justice of the Supreme Court of the United States:

The petition of the Delaware, Lackawanna & Western Railroad Company respectfully showeth—

That the petitioner is a corporation of the State of Pennsylvania, and was during all of the year ending with the first Monday of November, 1899, engaged in the business of operating a railroad, or system of railroads, and also in that of mining anthracite coal in said State, and selling the same in said State and in other States, its business of selling coal requiring it to keep on hand in a number of other States large quantities of coal;

That in and during all of said year ending with the first Monday of November, 1899, your petitioner owned and had stored and on hand at Buffalo, New York, and Chicago, Illinois, and at other points outside of the State of Pennsylvania, coal held for sale at said points of the value of $1,702,443. which amount was included in the valuation of the petitioner's capital stock contained in its report of capital stock made to the auditor general as required by the laws of said State for the said year ending with the first Monday of November, 1899. The said auditor general, acting under alleged authority of the Pennsylvania acts of June 7, 1879, (P. L. 112), June 1, 1889, (P. L. 420), June 8, 1891, (P. L. 229), and June 8, 1893, (P. L. 253), in taxing your petitioner upon its capital stock for the said year ending with the first Monday of November, 1899, included tax upon its capital stock invested in and representing the said coal on hand in other States outside of Pennsylvania;

That the tax on capital stock imposed upon corporations by the laws of the State of Pennsylvania has been decided by the
64 highest court of that State to be a tax upon the corporate property and assets;

That your petitioner appealed from the said account to the court of common pleas of Dauphin county, Pennsylvania, to No. 213 Commonwealth docket, 1900, in said court, and with its said appeal filed, *inter alia*, the following specifications of its objections to the legality of the tax, viz:

"1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction.

The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them can be so construed, they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

"2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly, contemplate the taxation of railroads, interests in railroads and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

"11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893,
under which said tax is claimed, cannot, nor can either of
65 them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them are to be so construed, then they or any or either of them are in violation of the necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.

"12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits."

That upon the trial of the case an agreement in writing was entered into between the parties, whereby the question of liability of

the petitioner to tax upon the said coal, or upon its capital stock represented thereby, was withdrawn from the jury and reserved for the determination of the court, said agreement, which was made part of the record, being as follows:

"And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, the judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21 being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent., either of the parties
66 to be at liberty to file exceptions to, and appeal from the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874."

The depositions of Fred. F. Chambers and W. H. Truesdale attached to and made part of said agreement contain, *inter alia*, the following:

"Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law, to be appraised for taxation,

was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such point. The said coal when shipped from Pennsylvania was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York.

"In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.

"Although the Delaware, Lackawanna and Western Railroad Company was originally chartered under the laws of Pennsylvania, it has received authority to transact business and hold land in New Jersey and also transact business and hold land and have its general office and place of business in the city and State of New
67 York, said authority having been granted by special acts of the legislature- of said States. It is also authorized, by virtue of a special act of the General Assembly of Pennsylvania, to maintain its general office and place of business and hold its stockholders' meetings in the city of New York and to have as president, directors, and other officers, non-residents of the State of Pennsylvania. In pursuance of authority conferred by legislative enactments of the said two States, the company's general office and place of business, including its treasury, is, and was in 1899, and for ma-y years prior thereto, located at No. 26 Exchange place, in the city of New York. Its president, secretary and treasurer and other general officers are non-residents of Pennsylvania and reside in the city of New York or its vicinity, and have their offices in the company's general office at No. 26 Exchange place, as aforesaid."

That at the trial of the case in said court of common pleas of Dauphin county, your petitioner also submitted, *inter alia*, the following point, viz.:

"4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits."

That after full argument, the said court of common pleas of Dauphin county directed judgment to be entered in favor of the

Commonwealth of Pennsylvania, and against your petitioner, upon the said reserved question, overruling the said specifications of objection and refusing the said point, and finding tax to be due the Commonwealth of Pennsylvania upon your petitioner's capital stock invested in and representing said coal on hand in other States.

That the court of common pleas of Dauphin county subsequently overruled exceptions filed by your petitioner to its action in not sustaining the aforesaid specifications of objection and in refusing the said point, and judgment was entered in favor of the Commonwealth and against your petitioner in said court.

68 That your petitioner thereupon took an appeal from the said judgment of the court of common pleas of Dauphin county to the supreme court of Pennsylvania, to No. 18, May term, 1901, of the middle district of said court, and amongst its assignments of error in the said supreme court included the overruling of its exceptions to the action of the court of common pleas of Dauphin county in not sustaining the four specifications of objection above stated and in refusing the above point;

That the said cause having been fully argued in the supreme court of Pennsylvania, that court, upon the 9th day of July, 1903, affirmed the judgment of the court of common pleas of Dauphin county;

That the supreme court of Pennsylvania in which said cause was heard and decided is the highest court of record and the court of last resort, in the Commonwealth of Pennsylvania;

That the judgment of the said court is final;

That the judgment of the said court, as already shown, involved the decision of Federal questions; that said decision is in favor of the validity of the State law and against the immunity claimed by your petitioner under the Constitution of the United States;

Wherefore, your petitioner (presenting herewith a bond, with security, for approval) prays that a writ of error may be allowed to the said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction, in that which violates the constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever

69 pray, &c.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By its attorneys, M. E. OLMSTED,
A. C. STAMM.
WALTER W. ROSS,
General Attorney.

Endorsement: In the Supreme Court of the United States.—Delaware, Lackawanna & Western Railroad Co., plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error.—Petition for writ of error.—Filed in supreme court, Mar. 2, 1904, middle district.

70 *Writ of Error Bond.*

Supreme Court of the United States.

DELAWARE, LACKAWANNA & WESTERN Railroad Company, Plaintiff in Error, vs. COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.	In Error to the Supreme Court of Pennsylvania, Middle District. No. 18, May Term, 1901.

Know all men by these presents, that we, The Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, principal, and The Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact the business of indemnity and suretyship in the State of Pennsylvania, and having an office and principal place of business for the State of New York, at No. 35 Wall street, in the borough of Manhattan, in the city of New York, surety, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of nineteen thousand, seven hundred and sixty-seven and 42/100 dollars ($19,767.42), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of September, nineteen hundred and three.

Whereas, lately, in the court of common pleas in and for the county of Dauphin, judgment for nine thousand eight hundred and eighty-three and 71/100 dollars ($9,883.71) was entered against the Delaware, Lackawanna & Western Railroad Company at the suit of the Commonwealth of Pennsylvania, of Commonwealth docket, 1900,
No. 213, which judgment was afterwards affirmed by the su-
71 preme court of the State of Pennsylvania, in a certain plea and suit in said court of May term, 1901, No. 18, and the said Delaware, Lackawanna & Western Railroad Company have prosecuted or are about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment entered in the above entitled suit by the supreme court of Pennsylvania:

Now, the condition of this obligation is such that if the above named Delaware, Lackawanna & Western Railroad Company, plaintiff in error, shall prosecute its writ of error with effect and answer

all damages and costs if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By W. H. TRUESDALE, *President.*

Attest:

[Seal of Delaware, Lackawanna & Western Railroad Company.]

FRED. F. CHAMBERS, *Secretary.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*

Attest:

[Seal of Fidelity and Deposit Company of Maryland.]

JAMES R. KINGSLEY, *Attorney in Fact.*

Signed, sealed and delivered in the presence of:
CHARLES W. MARSH.
ERNEST L. HICKS.

Approved to operate on a supersedeas.

EDWARD D. WHITE,
Associate Justice.

Washington, Feb'y 15th. 1904.

72 STATE OF NEW YORK, } ss:
County of New York, }

On the 29th day of September, in the year 1903, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

(S'g'd)
[NOTARIAL SEAL.]

ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"Resolved, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or
73 "Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh "M. Allwood and James R. Kingsley, attorneys-in-fact of this "company, in the State of New York, be, and each of them is, hereby "authorized and empowered to sign, execute and deliver any and "all bonds or undertakings for or on behalf of this company, and to "attach thereto the seal of the corporation, the same to be at- "tested by the said George Sewell Bonner, attorney of the company, "or by either one of the other persons above named, as occasion "may require."

COUNTY OF NEW YORK, ss:

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 29th day of Sept., 1903.

JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement December 31st, 1902.

Resources.		Liabilities.	
Real estate	$670,000 00	Capital stock	$2,000,000.00
Stocks and bonds	2,723,100.00	Surplus and undivided profits	2,876,233.57
Railroad bonds	2,059,600.00	Premium reserve	717,297.87
Net premiums due	102,807.25	Claims in process of adjustment	31,012.45
Cash in bank, etc	235,058.63	Claims reported	166,021.99
	$5,790,565.88		$5,790,565.88

74 STATE OF NEW YORK, }
County of New York, } ss:

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition

of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

(S'g'd) JAMES R. KINGSLEY.

Subscribed and sworn to before me this 29th day of Sept., 1903.

ERNEST L. HICKS,
[NOTARIAL SEAL.] *Notary Public, New York County.*

Endorsement: Supreme Court of the United States.—Delaware, Lackawanna & Western Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error.—Bond.—I approve of the within undertaking, and of the sufficiency of the surety therein.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defen- at error of the right, at any time, to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. (S'g'd) E. Henry Holcombe, U. S. circuit court.—Fidelity and Deposit Company of Maryland, 35 Wall street, New York.

75 *Certificate.*

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to seventy four inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity of the State of Pennsylvania, in the case lately depending therein, to No. 18 May term 1901, middle district, wherein The Commonwealth of Pennsylvania was plaintiff below and appellee and The Delaware, Lackawanna & Western Rail Road Company was defendant below and appellant, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this seventh day of March A. D. 1904.

{Seal of the Supreme Court of Pennsylvania, Middle District, 1776.}

WILLIAM PEARSON,
Prothonotary of Supreme Court, Middle District.

76 In the Supreme Court of the United States, —— Term, 1904.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA.

Sur writ of error by the Delaware, Lackawanna & Western Railroad Company to the supreme court of Pennsylvania.

Assignment of Errors.

1. The learned court erred in not sustaining the company's first exception to the decision of the court of common pleas of Dauphin county, viz:

"1. The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

"'1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

2. The learned court erred in not sustaining the company's second exception to the decision of the court of common pleas of Dauphin county, viz:

"2. The learned court erred in not sustaining the second objection specified in defendant's appeal, said objection being
77 as follows, viz:

"'2. Appellant's system of railroads is partly in Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other act of assembly contemplate the taxation of railroads, interest in railroads, and railway

equipment, real estate, tugs, barges, coal, or any other propery located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

3. The learned court erred in not sustaining the company's fourth exception to the decision of the court of common pleas of Dauphin county, viz:

"4. The learned court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

"'4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the auditor general's department, sanctioned by the courts, of apportioning the taxes according to the respective pro portions of capital stock invested in and out of the State, and is, for that reason, in violation of section 1 of article IX. of the constitution of Pennsylvania and of section 1 of article XIV. of the amendments to the Constitution of the United States.'"

4. The learned court erred in not sustaining the company's fifth exception to the decision of the court of common pleas of Dauphin county, viz:

"5. The learned court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

78 "'11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its territorial limits.'"

5. The learned court erred in not sustaining the company's sixth exception to the decision of the court of common pleas of Dauphin county, viz:

"6. The learned court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

"'12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States await-

ing sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States which limits the taxing authority of each State to subjects within its territorial limits.'"

6. The learned court erred in not sustaining the company's seventh exception to the decision of the court of common pleas of Dauphin county, viz:

"7. The learned court erred in its answer to the third point submitted by defendant, said point and answer thereto being as follows, viz:

"'3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.'"

"Answer: 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.'"

7. The learned court erred in not sustaining the company's eighth exception to the decision of the court of common pleas of Dauphin county, viz:

"8. The learned court erred in its answer to the fourth
79 point submitted by defendant, said point and the answer thereto being as follows, viz:

"'4. The taxation of coal, or of capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.'"

"Answer. 'Refused for reasons given in the general opinion.'"

8. The learned court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of article I., section 8, clause 3, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

9. The learned court erred in affirming the judgment of the court of common pleas of Daulphin county in favor of the Commonwealth of Pennsylvania and against the Delaware, Lackawanna & Western Railroad Company.

10. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of the United States of America:

The party prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By its attorneys, M. E. OLMSTED,
A. C. STAMM.

WALTER W. ROSE,
General Attorney.

80 [Endorsed:] In the U. S. Supreme Court. Delaware, Lackawanna & Western Railroad Company, (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Assignment of errors. Olmsted & Stamm.

Endorsed on cover: File No. 19,268. Pennsylvania supreme court. Term No. 208. The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed March 11th, 1904. File No. 19,268.

Supreme Court of the United States.

October Term, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In error to the Supreme Court of the State of Pennsylvania.

PAPER BOOK OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Pennsylvania Revenue Statute, approved June 8, 1891, and found in the published laws of Pennsylvania for that year, commencing at page 229, taxes the property of domestic corporations and also of foreign corporations "having capital or property employed or used in this Commonwealth" at the rate of 5 mills, as-

sessed upon a cash valuation of capital stock to be made between the 1st and 15th days of November in each year.

The Plaintiff in Error, the Delaware, Lackawanna and Western Railroad Company, is a corporation of the State of Pennsylvania, but under authority of law having its principal office and place of business and treasury in the City and State of New York. It owns certain railroads and leases others so that the line which it operates extends from Hoboken, New Jersey, through Pennsylvania, to Buffalo, New York. It is authorized by its charter (granted prior to the adoption of the present Constitution of Pennsylvania) not only to operate railroads, but also to mine and buy and sell coal. It owns and operates extensive coal mines in Pennsylvania, and is largely engaged in mining and selling coal, most of which is sold and delivered at points outside of Pennsylvania. A large part of the coal is sold or contracted for before it leaves the mines, or shortly thereafter. Its sales of this character in 1899 amounted to $18,587,258. The amount of such sales, however, is not drawn in controversy in this case. But in addition to such sales the company also maintains at Buffalo, New York; Chicago, Illinois; and certain points in other States and in Canada, yards for the sale of coal at retail. At the tax appraisal period, in 1899, the company had in stock in its yards at Buffalo, New York; Chicago, Illinois; and points in Michigan, New Jersey, and Canada, coal of the value of $1,702,443.

The par value of the company's capital stock is $26,200,000, but its appraisement for 1899 amounted to $48,-

470,000. In returning this appraisement to the Auditor General the company did not specify the items for which it claimed deductions, and that officer assessed the tax of 5 mills upon the entire valuation of $48,470,000, the tax amounting to $242,350. From the settlement of this account by the Auditor General and State Treasurer the company, as permitted by law, appealed to the Court of Common Pleas of Dauphin County (that being the county in which the seat of government is located) and produced evidence showing that its valuation included certain railroads, or interests in railroads in other States, also railroad equipment, real estate, tugs and barges and other property located and used in States other than Pennsylvania, including coal of the value of $1,702,443, stored in its retail yards at Buffalo and other points, as aforesaid. Upon the trial of the case, deductions were made of the value of the other items of property, real and personal, outside of Pennsylvania, including the real estate used for yards for the storing of the coal at Buffalo and other points, but the item of coal—the coal itself—$1,702,443, was made the subject of a reserved point. All other matters in controversy were disposed of by the entry of a verdict whereby the tax was reduced to $102,737.79, leaving the question of the taxibility of the coal to be determined by the Court without the intervention of a jury, under the Pennsylvania Statute of April 22, 1874, the Court to find both the law and the facts. The trial court concluded that "there was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the

Commonwealth, and never subject to the visatorial power of the Auditor General or any other authority.

"But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition."

Speaking further of the coal, the learned trial judge said—"After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing to-morrow —fugitive ever until it reaches the torch.

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for State purposes."

He therefore sustained its taxibility in Pennsylvania, notwithstanding the fact that the evidence showed that the coal had been taxed for both State and local purposes in the other States where located and held awaiting sale, and entered judgment for the 5 mills tax, amounting to $8,512.21, with interest and Attorney General's commission added, making a total judgment of $9,883.71.

That judgment was, upon appeal, sustained by the Supreme Court of Pennsylvania, to which this writ of error has been taken.

ASSIGNMENT OF ERRORS.

*1. The learned Court erred in not sustaining the company's first exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"1. The learned Court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz:

" '1. The account hereby appealed from is erroneous and illegal, because therein tax is charged upon the entire capital stock of the company, including that portion thereof invested in or representing railroads, railroad interests, railroad equipment, boats, barges, real estate, coal and other tangible property in other States outside of the Commonwealth of Pennsylvania and beyond its jurisdiction. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either or any of them, be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if the said acts or either or any of them do they are in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

2. The learned Court erred in not sustaining the company's second exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"2. The learned Court erred in not sustaining the second objection specified in defendant's appeal, said objection being as follows, viz:

" '2. Appellant's system of railroads is partly in

*Note. The errors assigned in Nos. 1, 2, 3 and 4 relate only to the coal, the company's claims as to the other items of property, real and personal, all having been allowed and the value thereof deducted from the appraisement by the State Courts.

Pennsylvania and partly in other States. In the roads in other States belonging to its system it has large and valuable interests. It also owns a large amount of equipment, locomotives, freight and passenger cars, used upon its lines outside of Pennsylvania, and also certain real estate, tugs, barges, coal, &c., in other States outside of and beyond the jurisdiction of Pennsylvania. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, do not, nor does either or any of them, nor does any other Act of Assembly contemplate the taxation of railroads, interest in railroads, and railway equipment, real estate, tugs, barges, coal, or any other property located and used outside of the State of Pennsylvania, nor of any capital stock representing said property, or if they do, they are unconstitutional and void because in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

3. The learned Court erred in not sustaining the company's fourth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"4. The learned Court erred in not sustaining the fourth objection specified in defendant's appeal, said objection being as follows, viz:

" '4. In charging tax upon the capital stock of the company appellant, a portion of which is invested in and represents property located or used in other States, the settlement is a departure from the custom of the Auditor General's department, sanctioned by the Courts, of apportioning the taxes according to the respective proportions of capital stock invested in and out of the State, and is, for that reason, in violation of Section 1 of Article IX. of the Constitution of Pennsylvania and of Section 1 of Article XIV. of the amendments to the Constitution of the United States.' "

4. The learned Court erred in not sustaining the com-

pany's fifth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"5. The learned Court erred in not sustaining the eleventh objection specified in defendant's appeal, said objection being as follows, viz:

" '11. The account hereby appealed from is erroneous, illegal and void, because therein tax is charged upon a portion of the capital stock of the company appellant invested in and representing real estate, coal and other tangible property owned by appellant at points without the State of Pennsylvania and beyond its jurisdiction. The Acts of June 7, 1879, June 1, 1889, June 8, 1891, and June 8, 1893, under which said tax is claimed, cannot, nor can either of them be construed to impose a tax upon property or upon capital stock representing property located or used in other States; or if said acts, or either of them, are to be so construed, then they or either of them are in violation of the necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

5. The learned Court erred in not sustaining the company's sixth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"6. The learned Court erred in not sustaining the twelfth objection specified in defendant's appeal, said objection being as follows, viz:

" '12. A portion of the assets of the company in 1899 consisted of anthracite coal mined in Pennsylvania but transported therefrom to points in other States and held in storage in said other States awaiting sale or delivery to residents of said States. The taxation, or attempted taxation, of said coal by the Commonwealth of Pennsylvania in the account hereby appealed from, is in violation of a necessary implication of the Constitution of the United States, which limits the taxing authority of each State to subjects within its territorial limits.' "

6. The learned Court erred in not sustaining the company's seventh exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"7. The learned Court erred in its answer to the third point submitted by defendant, said point and answer thereto being as follows, viz:

" '3. Coal which, although originally mined in Pennsylvania, has been permanently removed therefrom and was at the time of the assessment of the tax located and stored in another State or States, was not, and is not, subject to taxation by the State of Pennsylvania.' "

"Answer. 'Relating as it must to the purpose of the shipment of the coal in question, and the location of it in another State for immediate sale, this point is refused.' "

7. The learned Court erred in not sustaining the company's eighth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"8. The learned Court erred in its answer to the fourth point submitted by defendant, said point and the answer thereto being as follows, viz:

" '4. The taxation of coal, or capital stock representing coal, located and stored in States other than Pennsylvania, is in violation of a necessary implication of the Constitution of the United States that each State shall have jurisdiction only over property within its territorial limits.' "

"Answer. 'Refused for reasons given in the general opinion.' "

8. The learned Court erred in not holding that the taxation by the State of Pennsylvania of coal mined within the State and shipped into other States and there stored for the purposes of sale is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which provides that Congress shall have the

power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

9. The learned Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the Delaware, Lackawanna & Western Railroad Company.

10. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Dauphin opinion.' "

BRIEF OF ARGUMENT OF APPELLANT IN ERROR.

I. The Tax Claimed is a Tax on Property.

The tax sought to be recovered by the Commonwealth of Pennsylvania is a tax upon the property of corporations having capital stock. The existing law is found in the Pennsylvania statute approved June 8, 1891, and appears in the published laws of Pennsylvania for that year commencing at page 229. It is entitled:

"An Act to provide increased revenues for the purpose of relieving the burdens of local taxation, being supplementary to an act, entitled 'An Act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a

law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled 'A further supplement to an act entitled 'An Act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine,' and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value."

The rate of tax theretofore had been three mills upon an appraisement of values, except in certain cases where the rate of the tax was determined by the amount of dividends declared. But, in the preamble of the Act of 1891, it is set forth that—

"It appears that the taxes imposed upon corporations and individual citizens by the first and twenty-first sections of said act can be made much more nearly uniform by taxing all corporations, limited partnerships and joint-stock associations having capital stock at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds; therefore."

The 4th section of the Act of 1891 amends the 20th section of the Act of June 1, 1889, so as to read—

"That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or

organized by or under the laws of any other State or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.

Second. Total authorized number of shares.

Third. Number of shares of stock issued.

Fourth. Par value of each share.

Fifth. Amount paid into the treasury on each share.

Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fi-

delity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less however than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

The 5th section of the Act of 1891 amends the 21st section of the Act of 1889, so as to read as follows—

"That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock, of all kinds, including common, special and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of the settlement of the account by the Auditor General and State Treasurer: *Provided*, That for the purpose of this act interests in limited partnerships or joint-stock associations shall be deemed to be capital stock and taxable accordingly: *Provided also*, That corporations, limited partnerships and joint-stock associations liable to tax on capital stock under this section, shall not be required to make report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right, but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations, organized exclusively for manufacturing purposes and actually carrying on manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain: Provided *further*, In case of fire and marine insurance companies the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock."

The amendatory Act of June 8, 1893, Laws of Pennsylvania, 1893, page 353, makes a change in one of the provisos relating to manufacturing companies, but has no bearing upon the present controversy.

The Act of 1891 was before the Supreme Court of Pennsylvania in *Commonwealth of Pennsylvania* vs. *New York, Pennsylvania & Ohio Railroad Co., 188 Pa., 169.* In that case the company endeavored to resist the payment of the tax upon the ground that, by reason of its great indebtedness, its shares were of no value. The Auditor General estimated the value of the property to be something over $34,000,000. The trial court found the value of the property to be $15,000,000, and assessed the tax upon that basis. Mr. Justice Dean delivering the opinion of the Supreme Court said (p. 188):

"The defendant appraises its capital stock as of no value whatever; the Commonwealth appraises it at $34,480,577.70, the Court below appraises it at less than half that amount. The main dispute between the Commonwealth and defendant is as to the construction of the Act of 1891. It may be conceded at once, that the legislative intent to levy the higher amount must be expressed or result from necessary implication, for if in a tax law the intent be doubtful it does not exist. The title of the act declares the purpose to be to tax 'all the property of corporations, limited partnerships and joint-stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words 'having capital stock' are used to distinguish such corporations from beneficial, religious and other corporations having membership, but not capital stock representing the respective interests of members in the corporate prop-

erty. Then, preamble six of the act further declares it to be the purpose to tax 'All corporations, limited partnerships and joint-stock associations having capital stock, at a fixed rate of five mills on each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest as their franchises and property of other kinds.'

"In *Commonwealth* v. *Standard Oil Co., 101 Pa., 119*, speaking by Paxson, *J.*, this Court held: 'It has been repeatedly decided and is settled law that a tax upon the capital stock of a company is a tax upon its property and assets.' Then in *Fox's Appeal, 112 Pa., 354*, it is said: 'The capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the Courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' In *Commonwealth* v. *Delaware, Susquehanna & Schuylkill R. R. Co., 165 Pa., 44*, opinion by McCollum, *J.*, we said: 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting that value, the franchise of the company? We think this question is affirmatively answered by the Act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.' There are other cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this Court of a tax on capital stock of a corporation being, that it is a tax upon all the property of the corporation, it is clear that the learned judge of the Court below committed no error in the first sentence of his conclusion of law, thus: 'A

tax on the capital stock of a corporation is a tax upon its property and assets, including its franchises.' "

And again at page 190, the learned Justice says:

"The contention of appellant's counsel, in substance is, that to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property; the remainder would then represent the actual value of the capital stock. This would, in many cases, hide the tangible property and turn the Commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided, that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that capital stock in taxing statutes meant the property and assets of the corporation before them, they declared, in the Act of 1891, precisely to the contrary. In fact, from the wording of preamble six of the Act of 1891, we do not doubt, that at least the framer of the act was familiar with the opinion of this Court in *Com. v. Oil Co., supra.*

"In supporting their argument on each side, counsel have given undue significance to the indebtedness of the corporation; strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises and the rights and privileges they possessed under their grants. The Commonwealth no more sought by the Act of 1891 to ascertain and tax the net assets of these artificial beings, than by the usual tax laws, she seeks to tax the net assets of natural ones; in the latter case

she rarely inquires as to what the taxpayer owes; she does ask what he is possessed of; it is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation; in either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchises and property."

The tax had always, under the earlier acts, been construed as a tax upon property.

"It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." *Com.* vs. *Standard Oil Co., 101 Pa., 145.*

"It merely taxes its property, that is, its capital stock, to the extent that it brings such property within its borders in the transaction of its business." *Ibid., 146.*

"The power of taxation is limited to subjects within the jurisdiction of the State, and it was not the intent of these acts to tax the whole capital stock of foreign corporations, irrespective of the place of its investment, but to tax the property of such company, that is, its capital stock, to the extent that it brings such property within the State in the transaction of its business." *Ibid., 120.*

And see *Bank of Commerce* v. *New York City, 2 Black, 620.*
Bank Tax Case, 2 Wall., 200.

II. IT WAS NEITHER WITHIN THE INTENT, NOR THE POWER, OF THE LEGISLATURE OF PENNSYLVANIA TO IMPOSE A TAX UPON TANGIBLE PROPERTY NOT WITHIN HER TERRITORIAL LIMITS NOR THE PROTECTION OF HER LAWS.

No Pennsylvania statute imposing this character of tax has ever borne evidence of any intention that it should have extra-territorial effect and the existing law in express terms confines its operation to corporations "having capital or property employed or used in this Commonwealth." These taxing statutes have always been construed as limited in their operation to property within the State, and taxable under its laws. Where it has been shown that the capital stock represented tangible property beyond the limits of the State or which, for any other reason, was not subject to State taxation, the Courts have always required proper deductions to be made, as in *Com.* v. *Standard Oil Co., supra.* That was a foreign corporation, but the same rule has invariably been applied to domestic corporations as well. Thus in *Commonwealth* v. *Delaware, Lackawanna & Western Railroad Company* (the present plaintiff in error), *145 Pa., 96,* it was, as stated in the syllabus, held that—

"The capital of such company, invested in real estate and other railroads outside the State, and in vessels, barges and tugs, built, registered and used wholly outside the State, is not subject to such taxation; the said property being already taxable in the States where it exists and is used."

In the same case it was held that railroad equipment consisting of locomotives and freight and passenger cars owned by the Pennsylvania corporation but used

upon roads operated by it in other States, was not taxable in Pennsylvania, and the cars, having been used interchangeably upon roads within and without the State, the amount of the deduction upon that account was ascertained upon a mileage basis. The total value of equipment owned by the company was found to be $8,134,823, and the value of equipment owned by the company for use upon its roads outside of Pennsylvania was, upon the mileage basis, found to be $3,059,481, which amount was deducted in ascertaining the taxable valuation (p. 98).

In *Commonwealth* v. *Pennsylvania Coal Company* and *Commonwealth* v. *National Transit Company*, argued together, (not found in State reports but reported in note to *Com.* v. *Montgomery Lead & Zinc Mining Co., 5 Pa. County Court Reps., 89*), the Supreme Court of Pennsylvania held that United States bonds, not being taxable under the laws of Pennsylvania, must be deducted from the valuation in imposing the tax on capital stock and that pipe lines, engines, machinery, tanks and rights in other States must also be deducted, saying, in a *per curiam* opinion, that "It was correctly held by the learned judges in the Court below that so much of the tangible property of the corporation as was situate in other States and there employed in their corporate business was not taxable here."

In *Com.* vs. *Westinghouse Electric & Manufacturing Co., 151 Pa., 265*, it was held that the tax on capital stock, being a tax on property, could not be applied to so much of the capital stock as represented United States patents. The trial judge said (p. 270):

"Being upon the capital stock, it is a tax upon the company's property and assets: *Com.* v. *Standard Oil Co., 101 Pa., 119; Fox's Appeal, 112 Pa., 354;* and is, therefore upon the patent rights themselves, whether they are original patents or assignments or grants or licenses. * * * * * Considered, therefore, as a tax upon the right itself, we think it cannot possibly be supported, because it restrains and interferes with a right granted by Congress in the exercise of power exclusively committed to the Government of the United States by the Federal Constitution."

And Mr. Justice Heydrick, writing the opinion of the Supreme Court, said (p. 275):

"Part of its capital is invested in patent rights, and that it is not taxable upon that part is so clearly and forcibly shown by the learned Court below as to render further discussion of that subject undesirable. It is equally clear that it is not taxable upon another part invested in manufacturing plants situated in New York and New Jersey. This, however, is not controverted. But in addition to the items upon which tax was imposed by the judgment of the Court below it is taxable upon so much of its tangible property as is situated in this Commonwealth."

In *Commonwealth* v. *American Dredging Company, 122 Pa., 386,* it was ruled, as stated in the syllabus, that—

"1. A corporation is not liable to taxation in this State upon so much of its capital stock as is represented by real estate situated, or by personal property of a corporeal nature ordinarily kept, in another State.

"2. The rule, however, as to its vessels engaged in foreign or inter-state commerce, is that their situs for the purpose of taxation is their home port of registration.

"3. But, its unregistered vessels, not permanently located, in one place to-day and in another to-morrow,

have their situs for taxation in this State, the domicile of their owner."

In sustaining the tax upon $92,000 worth of stock represented by four barges, a tug-boat and eleven scows, not registered, Mr. Justice Paxson, delivering the unanimous opinion of the Court, said (p. 390):

"This is not because of the technical principle that the situs of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages, and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases, it is taxable within the jurisdiction where found and is exempt at the domicile of the owner. Goods and chattels, horses, cattle, and other movable property of a visible or tangible character are liable to taxation in the jurisdiction of the State wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner. Legal protection and taxation are reciprocal, so that such personal property and effects of a corporeal nature, or that may be handled and removed, as receive the protection of the law are liable to be taxed by the law where they are thus protected: *Rorer on Inter-State Law, 204,* and cases there cited; *Potter on Corporations, Secs. 139, 190; Pierce on Railroads, 472.* No fault is found with this principle."

It was held, however, that the principle did not apply to four dredges, a tug-boat and eleven scows involved in that case for reasons which will be hereinafter stated.

From what has been said it will appear that the Pennsylvania Courts have invariably ruled that the statutes of that State taxing capital stock were not intended

to and cannot, in any event, constitutionally be made to apply to tangible property, whether real or personal, so located within another State or country as to be subject to its laws and taxable there. Indeed, this rule is recognized by the Pennsylvania Courts in the very case at bar, and deductions have been made for every item of tangible property, both real and personal, owned by the company outside of Pennsylvania, except the item of coal in controversy. The undisputed evidence of the company's treasurer (Record, p. 21) shows that its equipment was of the value of $7,891,217, most of which was used in operating roads owned or leased to, and operated by the company outside of Pennsylvania, and that the value of the equipment owned and used in Pennsylvania was $1,986,219. The difference between these two sums, representing the value of the equipment used outside of the State, was deducted in the Pennsylvania Courts, as was also $498,700, the value of two tugs, 59 coal barges and 14 schooner barges registered and used wholly outside of the State of Pennsylvania, (Record, p. 24), and real estate owned by the company in other States of the value of $1,195,907. (Record, p. 22). The only tangible property held outside of the State which the Pennsylvania Courts refused to deduct was the coal of the value of $1,702,443. The real estate upon which that coal was stocked was admitted to be not subject to taxation and was deducted, Judge Weiss, delivering the opinion of the trial court saying (Record, p. 30):

"Being a tax on property, it follows that the State cannot tax that part or portion of its property which is permanently located beyond her territorial limits."

And in the opinion of the Supreme Court (Record, p. 43) it is said:

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States, some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property."

In short, the principle is conceded that tangible corporeal personal property so located elsewhere as to be taxable in another State or country, is not taxable in Pennsylvania. But it is denied that the principle applies to the facts in this case. It is important therefore, to consider those facts.

III. The Coal in Question was permanently located, and actually taxed, in States other than Pennsylvania.

In the trial Court all matters in controversy were disposed of by the verdict of a jury except the taxability of the coal in question, concerning which it was agreed that it should be reserved from the verdict and submitted to the Court to find both the law and the facts, in accordance with the provisions of the Pennsylvania statute of April 22, 1874 (P. L., 109).

"Where a cause is submitted to the decision of the Court below without a jury under the Act of April 22, 1874, the findings of fact under such a submission are no more reviewable by the Supreme Court than is the

verdict of a jury." *Com. vs. Westinghouse Electric & Manufacturing Co., 151 Pa., 265.*

The facts found by the trial court, so far as material, are as follows:

"By the COURT. This case arose upon an appeal by defendant from an account for tax on capital stock for the tax year 1899, said account amounting to $242,350. Certain questions raised by the appeal having, by agreement of counsel been withdrawn from the jury and submitted for the determination of the Court without a jury, as if under the Act of April 22, 1874, we find the following facts:

"1. * * * * * The company, as authorized by a special act of Pennsylvania Legislature, has its general office and treasury in the City and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy and sell coal and convey the same to market; and, in addition to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the Auditor General made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania, in New York, Illinois and other States of the value of $1,702,443, and, as already stated, no deduction was made by the Auditor General in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

"2. There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the Attorney General, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz:

" 'And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,443, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the Court. If the Court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21, being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual Attorney General's commission of five per cent., either of the parties to be at liberty to file exceptions to, and appeal from the decision of the Court upon the said reserved point with like effect as if the case had been tried by the Court without a jury under the Act of April 22, 1874.'

"3. The case having been submitted to the jury, a verdict was rendered as follows, viz:

'Tax,	$111,250 00
Less five mills on coal $1,702,443.00,	8,512 21
	$102,737 79
Less payment on account,	100,000 00
	$2,737 79
Add Attorney General's commission of 5 per cent.,	136 88
Verdict for,	$2,874 67'

"The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the Court as aforesaid of the defendant's liability to taxation with respect to capital stock invested in coal located outside of Pennsylvania.

"4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

" 'Under powers conferred by special charter previous to the adoption of the present Constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchasers; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock

is required by law to be appraised for taxation was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the Auditor General's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. *On the contrary, said coal was intended to, and did become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899.* When the coal thus kept in stock in the States of New York, Illinois, and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the City and State of New York.

" 'In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after, its arrival at the points in other States to which it was to be delivered. What I have said above was with refference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.'

"5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business and to hold its stockholders' meeting, in the State of New York, and to have as president, directors and other officers, non-residents of the State of Pennsylvania. The company is taxable upon the *value* of the property represented by its capital stock, and not upon the *amount* of the latter."

The evidence upon which, in its first finding of fact, the trial Court found the taxes assessed in other States to have been paid, is contained in the supplemental and undisputed affidavit of Mr. Chambers, the treasurer of the company (Record, p. 26), as follows:

"I am the secretary and treasurer of the Delaware, Lackawanna and Western Railroad Company. Referring to the taxes mentioned in my former affidavit in the above-entitled case, I desire to add that they have been paid, I believe. The company is not contesting, but on the other hand concedes the rights of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid."

From the fact judicially found, the following important matters clearly appear:

1st. That the value of the coal, $1,702,443, "was included in the valuation of the company's capital stock upon which tax was charged in the Auditor General's account."

2d. That "the said coal, when shipped from Pennsylvania, was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to and did become part of the general mass of property in said other States and the company is there annually taxed

upon or in respect to the same and was so taxed for 1899."

3d. That the taxes, both State and local, assessed upon the coal in the States where located, have been paid.

4th. That the coal in other States was "stored in yards or upon docks maintained by the company for that purpose" and was there held "for purposes of sale" and as part of the company's stock in trade for that purpose, which purpose of selling coal is expressly authorized by its charter and is part of its corporate business.

5th. That "when the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the City and State of New York." But at the time the appraisement of capital stock was made, viz: Between the first and fifteenth days of November, 1899, the coal in controversy had not been sold. It was "on hand awaiting sale" at said points outside of Pennsylvania. It was destined never to return to Pennsylvania, and formed part of the general mass of property of the States where located, although it was not the intention of the company to retain permanent ownership of it.

Upon this state of facts, the Pennsylvania Courts have held that the principle so frequently enunciated by them, does not apply. But their reasoning is not convincing. Their theory seems to be that as the coal was awaiting sale it was not permanently located beyond the limits of the State. The learned trial judge said (Record, p. 30):

"It was transported to points in other States for temporary storage and immediate sale. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose."

But this is contradicted by the sentence immediately following, in which he says that "It is a commodity dealt in by the company." When the corporate purpose of a company is to mine or purchase and sell coal, the coal so mined and sold or held awaiting sale does certainly serve the corporate purpose and is a thing used in the prosecution of the business of the company. He further says: "It may be, and doubtless was, transported from there (the place where held awaiting sale) to other States and places after it was sold." But as to that there is no finding of fact, nor any evidence. It is highly improbable that coal held in stock for the purpose of sale at retail is, after such sale, transported into other States. But what became of it after it was sold, is a matter of no consequence. It had not been sold at the time of the appraisement and taxation. When sold it became the property of somebody else and not of this company. The proceeds of sale were returned, not to Pennsylvania, but to its treasury in the State of New York. Wherever the coal may have gone after it parted from the ownership of the plaintiff in error, it certainly did not come back to Pennsylvania, for, being anthracite coal, the further from the mine, the more valuable it is, owing to the cost of transportation. At the mine this coal would not have been worth the price of return carriage. The trial judge further says (Record, p. 30):

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

"It is this itinerant trait which likens the case to the dredges, tugs and scows in *Commonwealth* vs. *American Dredging Company, 122 Pa., 386,* employed beyond, but taxed within, the boundaries of this State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

"That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market."

But when this coal reached the place for market its journey was ended. It became intermingled with the general mass of property of that State and did have fixity. Furthermore, it did not "go exempt from the imposition of further burdens elsewhere for State purposes for the year specified." On the contrary, it was clearly subject to taxation in the States where located. It was within the protection of their laws—absolutely within their dominion and beyond the power of Pennsylvania either to protect or to regulate and control. The trial judge further said: "Coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related." But what protection could the laws of Pennsylvania give to coal located in Buffalo, or in Chicago, or in Canada? The learned justice who wrote the opinion of the Supreme Court has substantially adopted the reasoning of the trial judge. He says of the coal that "when shipped out of the State

it is for the purpose of sale and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury." He approves of the statement of the trial judge that "it is not a thing used in the prosecution of the business of the company" and adds that "the business is prosecuted that the coal may be sold and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers." He concedes that the real estate upon which the coal was stored, being necessary to enable the company to deal in coal, is exempt but insists that the coal itself is not exempt. The business of the company being to mine and sell coal, it would seem that the coal itself is at least as essential to that business as the real estate constituting the yard in which it is held for sale.

It is submitted, however, that the real question is not whether the coal is essential to the conduct of this company's corporate business, but whether by reason of its location in other States it is within the protection, and subject to the correlative power of taxation, of the State of Pennsylvania; or was within the protection and subject to the taxing power of the State or States in which it actually was at the time of the assessment and part of whose general mass of property it had become. This precise question first arose in *Commonwealth* v.

Pennsylvania Coal Company, 197 Pa., 351, which case, by reason of a subsequent compromise, did not reach this Court. In that case it was not shown that the coal had actually been taxed in the other States where located, and the Court likened that, as the trial Court has likened this case, to one feature of *Commonwealth* v. *American Dredging Co., 122 Pa., 386,* where, as hereinbefore shown, it was held that the facts relating to certain dredges, and scows, belonging to the dredging company took it out of the general principle that tangible property could not be taxed by a State when not actually therein. Upon that point the Court, in the *Dredging case,* said (p. 391):

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business, it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: *Pullman Palace Car Co. 29 Fed. Rep., 66; Hays* v. *Pacific Mail Steamship Co., 17 How., 596.* These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another State as to be liable to taxation under the laws of that State."

But there is a vast difference between dredging boats and scows floating upon the surface of the water, used

to dredge one stream or harbor to-day and another to-morrow, and coal which is mined, not for the purpose of being used one day in one place and the next day in another place, but is either sold at the mine or else shipped from the mine directly to the place of market. If there were no other reason, the cost of its handling and transportation would prevent it from ever possessing that "itinerant trait" which has been bestowed upon it for the purpose of likening it to that feature of the *Dredging case.* Furthermore, it is taken out of the reasoning of the *Dredging case* by the fact that there *is* here something to show that the coal is "so permanently located in another State as to be liable to taxation under the laws of that State." The evidence and the facts judicially found show that it has been actually taxed in the States where located and that the tax has been paid. No argument is needed to show that it was properly taxable there. That question has been clearly and distinctly ruled by this Court in *Brown* v. *Houston, 114 U. S., 622,* where, as stated in the syllabus, it was held that —

"Coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under general laws of that State, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port."

In that case, as appears from the opinion of the Court, the coal had never been unloaded from the boat,

but "that when said assessment was made, the said coal was afloat in the Mississippi River in the parish of Orleans, in the original condition in which it was exported from Pennsylvania" (p. 624), and that "having just arrived from Pittsburg, Pennsylvania, by flat-boats, and was on said boats in which it arrived and afloat in the Mississippi River; that it was held by Brown & Jones to be sold for account of the plaintiffs by the boat load, and that since then more than half of it had been exported from this country on foreign steamships and the balance sold into the interior of the State for plantation use by the flat-boat load."

Mr. Justice Bradley delivering the opinion of this Court, said (p. 629):

"Being in New Orleans and held there for sale without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer to foreign ports, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans."

Writing for the whole Court, the learned justice held that defendant's taxation was not a regulation of interstate commerce or foreign commerce, nor a duty on exports, and added (p. 632):

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisi-

ana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale."

The case at bar is stronger than *Brown* v. *Houston*. There the coal had not been unloaded from the flatboat in which it had been transported from Pennsylvania into Louisiana. The owners denied, but this Court held, that "it had become a part of the general mass of property in the State." In the case at bar the coal had been unloaded and was stored by the plaintiff in error awaiting sale at retail. It is admitted and found as a fact by the trial court that "said coal was intended to and did become part of the general mass of property in said other States and the Company is there annually taxed upon and in respect to the same and was so taxed for 1899, and that the tax

has been paid." Independent of this finding, the coal clearly was—more clearly if possible than in *Brown* v. *Houston*—a part of the general mass of property in the State in which it was located. It was within the protection of the laws of the States where located—absolutely within their dominion and in no way within the authority or jurisdiction of the laws of Pennsylvania from which, after its removal from said State, it could receive no protection whatever.

And *Brown* vs. *Houston* has been affirmed and reaffirmed over and over again.

In *Coe* vs. *Errol, 116 U. S., 517,* it was held, as stated in the syllabus, that

"Goods, the product of a State, intended for exportation to another State, are liable to taxation as part of the general mass of property of the State of their origin, until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose; the carrying of them to, and depositing them at, a depot for the purpose of transportation is no part of that transportation.

"When goods, the product of a State, have begun to be transported from that State to another State, and not till then, they become the subjects of inter-state commerce, and, as such, are subject to national regulation, and cease to be taxable by the State of their origin."

According to this ruling, the coal in question ceased to be taxable by the State of Pennsylvania the instant the cars into which it was loaded at the mine began to move upon their inter-state journey, and it became taxable the instant it reached the State of its destination and was there placed in stock awaiting sale. It had

then become part of the general mass of property of that State.

In the case last cited it was held that logs cut in Maine, which had commenced their inter-state journey through New Hampshire to a point in another State, were not taxable in New Hampshire because in the course of inter-state transportation, but that logs cut in New Hampshire and hauled to the town of Errol, on the Androscoggin River, in that State, to be subsequently transported from thence upon the river to a point in Maine, but which were held at Errol for a convenient opportunity for such transportation, had not yet started upon their inter-state journey, and not having left the State of New Hampshire, had not ceased to be a part of the general mass of its property and were therefore still taxable in that State. Mr. Justice Bradley, delivering the unanimous opinion of the Court, said (p. 525):

"This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation."

The coal here sought to be taxed by the State of Pennsylvania was, upon this reasoning, under the protection of the Constitution and free from taxation in

Pennsylvania, "when actually started in the course of transportation to another State, or delivered to a carrier for such transportation." But when the tax in controversy was assessed it had gone farther than that. It had not only actually started upon, but had actually ended, its journey, and was stored in coal yards in other States and was there awaiting sale.

Mr. Justice Bradley continued (p. 525):

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State."

It may be conceded that if this coal were stored at the mines in Pennsylvania, awaiting shipment to another State, it would still be taxable as part of the general mass of property in Pennsylvania, but, as already shown, its transportation to another State had not only

begun but had actually ended. Mr. Justice Bradley (p. 526) pointed out that the mere fact that goods were intended for exportation from one State to another country or State did not relieve them from taxation in the State of their origin "until actually put in motion for some place out of the State, or committed to the custody of a carrier for transportation to such place." He declared that it was not easy to designate or to find the precise moment of time when State jurisdiction begins and ends for commodities of commerce, although declaring it important to the shipper and to the State that the question should be so defined as to avoid ambiguity.

He further said (p. 527):

"This Court, as before stated, has since held that goods transported from one State to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the State to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the State from another State, nor subjected in any way to unfavorable discrimination. *Woodruff* v. *Parham, 8 Wall., 123; Brown* v. *Houston, 114 U. S., 622.*

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common

carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject."

In *Pittsburg & Southern Coal Co.* v. *Bates, 156 U. S., 577*, it was held, as stated in the syllabus, that—

"Coal, shipped by the owners at Pittsburg in their own barges to Baton Rouge for the purpose of being sold there or sent thence to supply orders, and moored at Baton Rouge in the original barges in which it was shipped to Pittsburg, is subject to local taxation there as a stock in trade, and such imposition of a tax violates no provision of the Constitution of the United States. *Brown* v. *Houston, 114 U. S., 622*, affirmed and applied to this case."

Mr. Justice Field, delivering the opinion of the Court, said (p. 589):

"The decision of the Court in *Brown* v. *Houston*, thus rendered, seems to be conclusive of the case now before the Court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

In *United States* v. *Knight Co., 156 U. S., 1-13*, Mr. Chief Justice Fuller cited approvingly *Coe* v. *Errol*, and quotes from Mr. Justice Bradley's opinion, as follows (p. 13):

"Does the owner's state of mind in relation to the

goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

In *Kelley* v. *Rhoads, 188 U. S., 1,* it was held that a herd of sheep, driven from a point in Utah and across the State of Wyoming for the purpose of reaching a point in Nebraska, were not taxable in Wyoming, being the subjects of inter-state commerce and not becoming intermingled with the general mass of property of Wyoming; but the principles ruled in the cases above cited were recognized and affirmed as correct by Mr. Justice Brown, who, in delivering the opinion, said (p. 5):

"The law upon this subject, so far as it concerns interference with the inter-state commerce, is settled by several cases in this Court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities. *State* v. *Engle, 34 N. J. Law, 425; Standard Oil Co.* v. *Bachelor, 89 Indiana, 1; Burlington Lumber Co.* v. *Willetts, 118 Illinois, 559.*

"The first case in which the question arose is that of *Brown* v. *Houston, 114 U. S., 622,* in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in the open market there on account of the owners in Pennsylvania, and lying at New

Orleans in flat-boats for sale, became intermingled, on its arrival there, with the general property of the State, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port. The case was affirmed in *Pittsburg, &c., Coal Co.*, v. *Bates, 156 U. S., 577*, which differed from the former only in the fact that the coal did not reach New Orleans, the port of destination, but was still on the Mississippi river, nine miles above Baton Rouge, where it was held for sale. It appeared that the boats were held subject to the orders of plaintiff to be navigated to such place or places as he might deem convenient or advantageous to the trade in which he was engaged.

"In *Coe* v. *Errol, 116 U. S., 517*, it was held that logs cut in New Hampshire, which were hauled down to the town of Errol on the Androscoggin River in that State, to be thence floated down the river to Lewiston, Maine, and were waiting a convenient opportunity for such transportation, were still a part of the general mass of property of the State liable to taxation, if taxed in the usual way in which such property was taxed in that State. It was a stipulated fact that the timber thus cut had lain over one season, being about a year, in the Androscoggin River in that State either in Errol, Dummer or Milan; and that other timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation. The question is thus stated by Mr. Justice Bradley: 'Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?' Said he: 'There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for

this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. * * * Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there.'

"The substance of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of inter-state commerce and is exempt from local assessment."

In *Diamond Match Co.* v. *Ontonagon, 188 U. S., 82,* this Court held that logs cut in Michigan and held in that State remained part of the general mass of property of that State and were there taxable, although it was the intention to take them down the river to another State at some future time. The principle enunciated in the above cited cases was, however, sustained, Mr. Justice McKenna, who delivered the opinion, saying (p. 93):

"The power of the State to tax everything which is part of what has been called 'the general property' or 'the general mass of property' of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made. Fortunately we are not without illustrations in prior cases, and in *Kelley* v. *Rhoads, p. 1, ante,* decided concurrently with this, we express the principles of decision.

"In *Brown* v. *Houston, 114 U. S., 622,* the property (coal in barges) had reached the State, but was yet in the boats in which it had been brought into the State. While on the barges it was offered for sale. It was held it had become part of the property of the State and was subject to taxation. *Pittsburg, &c., Coal Co.* v. *Bates, 156 U. S., 577,* had facts assimilating it to the case at bar, and it was affirmed on the authority of *Brown* v. *Houston.* As in the latter case, the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, Louisiana. The coal, however, had not reached, as the coal in *Brown* v. *Houston,* its exact destination. To accommodate the exigencies of the owner's business, the barges, 'about one hundred in number, were stopped and moored in the Mississippi River at a convenient mooring place about nine miles above the port of Baton Rouge.' The coal was held subject to taxation."

He also cited approvingly (p. 95) the declaration of Mr. Justice Bradley in *Coe* v. *Errol,* that the true rule upon the subject is that "such goods do not cease to be part of the general mass of property within the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

As already frequently pointed out, the case at bar is stronger than any of those cited. The transportation of the coal from Pennsylvania to another State had not only begun, but ended. The coal was at rest awaiting sale at its place of destination, not only subject to taxation but actually there taxed. All dominion of the State of Pennsylvania over this coal ceased the instant that its inter-state journey began. When that journey

was ended and the coal unloaded and stored in the yards at Buffalo, for instance, it became intermingled with, and part of, the general mass of property in New York, where, and not in Pennsylvania, it was taxable.

This very principle has been sustained by the Supreme Court of Pennsylvania in *Finley* v. *The City of Philadelphia, 32 Pa., 381,* where it was held, as stated in the syllabus, that—

"The household furniture of a surgeon in the Army of the United States, is liable to taxation in a city where he is stationed on duty, without the intention of acquiring a domicile."

The claim of the surgeon, as stated in the opinion of the Court, was "that this property ought to be exempt because he is a surgeon in the United States Army, stationed here on duty and with no intention of acquiring a domicile in this State or of remaining in it after he shall be relieved from duty."

Chief Justice Lowrie, delivering the opinion, said (p. 382):

"Is this a valid ground of exemption? We think not. There is nothing very poetic about tax laws. Wherever they find property, except what is devoted to public and charitable uses, they claim a contribution for its protection, without any special respect to the owner or his occupation, and without reflecting much on questions of generosity or courtesy.

* * * * * * * * * * * * * *

"The officer's household furniture, not within army quarters, stands as much in need of State protection as any other kind of property, or as the property of any other person."

It is manifest that under that ruling the State of

Pennsylvania would, if conditions were reversed, insist upon taxing coal mined in New York, Illinois or any other State, and brought within her borders and within her protection, and that her Courts would sustain such taxation. It is difficult, therefore, to understand upon what principle they hold that coal mined within her borders, but subsequently transported to and becoming intermingled with the general mass of property in other States, is still subject to her protection and power of taxation and not subject to the dominion and power of taxation of the States of whose general mass of property it has now become part.

IV. The taxation of property having its situs in another State is in violation of the Federal Constitution.

The statute, both upon its face and as construed by the Courts of the State, negatives the intention of taxing tangible property located and taxable in other States. It is equally clear that even if her legislature should so expressly enact, Pennsylvania could not enforce a tax upon coal mined within her borders after it had become part of the general mass of property of another State. Such taxation would not only be a violation of inter-state comity, but as well a violation of the Federal Constitution. It would, indeed, in cases such as this, be an interference with inter-state commerce. As has frequently been held, the power to tax,

involves the power to destroy. If Pennsylvania has the right in a case like this to impose any tax at all, she may impose such a tax as absolutely to prevent the shipment of coal beyond her borders. The 8th specification of error involves that proposition, but independently of that, the attempted taxation is in violation of a necessary implication of the Constitution which restrains the power, authority and jurisdiction of each State to persons, property and business within its territorial limits. In *McCulloch* v. *Maryland, 4 Wheat., 316*, there was no claim that the taxation sought to be imposed by the State violated any express provision of the Constitution, but that it was contrary to "a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."

What was that principle? The self-evident one that the objects of State taxation are those and those alone over which the sovereign power of the State extends.

Said Chief Justice Marshall (p. 429):

"It may be exercised upon every object brought within its jurisdiction.

"This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

* * * * * * * * * * * * * *

"If we measure the power of taxation residing in a

State, by the extent of sovereignty which the people of a single State possess, and can confer on its Government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up, from the incompatibility of a right in one Government to destroy what there is a right in another to preserve."

The learned Justice continued further: That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one Government a power to control the constitutional measures of another, and showed how the whole principle of our Government would be disastrously altered if such taxation were allowed. He there applied the principle to the matter of taxation by a State, of property of the United States, but the principle applied was that a State has no power of taxation of property over which it has no jurisdiction.

In *St. Louis* vs. *Ferry Co., 11 Wall., 423*, this Court held that ferry boats of a corporation of one State, carrying passengers forward and backward across the river to a city in another State, did not obtain a taxable

situs in and were not taxable by that city, and Mr. Justice Swayne, delivering the opinion said (p. 430):

"If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In *Hays v. Pacific Mail Steamship Co., 17 How., 596,* this Court denied the right of the State of California to tax vessels owned and registered in New York, but temporarily docking in California, Mr. Justice Nelson, who delivered the opinion of the Court, saying (p. 599):

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation. They were not properly abiding within its limits so as to become incorporated with the other personal property of the State."

Here the State of Pennsylvania is trying to tax property which has become incorporated with the property of another State.

In *Case of the State Tax on Foreign-held Bonds, 15 Wall., 300,* it was, as stated in the syllabus, held that—

"The power of taxation of a State is limited to persons, property and business within her jurisdiction. All taxation must relate to one of these subjects."

And that

"The tax laws of a State can have no extra-territorial operation."

It was in that case decided that bonds issued by a Pennsylvania corporation and secured by mortgage upon property within that State were, nevertheless, not taxable by the State when held and owned beyond her territorial limits. Said Mr. Justice Field, delivering the opinion (p. 319):

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

And again (p. 325):

"We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the Company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation."

Referring to the case of *Railroad Co.* v. *Jackson, 7 Wall., 262*, the learned Justice criticised to some extent the reasoning by which the Justice who had delivered the opinion in that case reached certain conclusions, but said (p. 319): "The decision is nevertheless authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. In-

deed it would seem that no adjudication should be necessary to establish so plain a proposition."

In *Pullman's Car Company* v. *Pennsylvania, 141 U. S., 18,* this Court recognized the right of Pennsylvania to tax personal property—sleeping and parlor cars—used within her borders, but owned by a corporation of Illinois. Mr. Justice Gray, who delivered the opinion, said (p. 22):

"The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

"No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed by the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used. *Green* v. *Buskirk, 5 Wall., 307, and 7 Wall., 139; Hervey* v. *Rhode Island Locomotive Works, 93 U. S., 664; Harkness* v. *Russell, 118 U. S., 663, 679; Walworth* v. *Harris, 129 U. S., 355; Story on Conflict of Laws, Sec. 550; Wharton on Conflict of Laws, Secs. 297-311.* As observed by Mr. Justice Story, in his commentaries just cited, 'although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual

situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'

"For the purposes of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax."

In view of this ruling, which sustained the decision of her own Courts, Pennsylvania, having established her right to tax tangible personal property used within her limits though owned by citizens of other States, is hardly in position to consistently deny to other States the right to tax property there located though owned by citizens of Pennsylvania. After taxing all property, real and personal, within her own territorial limits, she ought to be content without striving to collect a tax upon property located and used in other States. As already shown, the rule of inter-state comity, as well as the constitutional requirement, is that each State shall tax only what is within her own territorial jurisdiction, thus avoiding the inevitable conflict which must result if two or more States claim jurisdiction and taxing authority over the same property. In the case last cited, this Court not only defined the limits but as well the character of the particular tax in question, Mr. Justice Gray saying (p. 25): "The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property." As the Pullman cars were used in several

States, the proportionate value taxable in Pennsylvania was ascertained upon a mileage basis, concerning which this Court said (p. 26):

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

In the case at bar, the coal has already been taxed once upon its full value in the States where located and if this pending claim shall be sustained, a second tax upon the same property will have been collected by the State of Pennsylvania.

The ruling in the *Pullman case* is cited approvingly in the opinion of Mr. Chief Justice Fuller, in *Adams Express Co.* v. *Ohio, 165 U. S., 194,* and also in the opinion of Mr. Justice Brewer, in denying a re-hearing in *Adams Express Co.* v. *Ohio, 166 U. S., 185.* In the latter case the learned Justice said (p. 224):

"It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was *'mobilia personam sequuntur,'* but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania, 141 U. S., 18, 22;*"

and its application in that case was denied even as to the intangible property, the taxation of which was there involved.

The *Pullman case* was again affirmed in *American Refrigerator Co.* v. *Hall, 174 U. S., 70.*

In conclusion, it is submitted—

First. That the coal in question was, at the time of its assessment for purposes of taxation, beyond the jurisdiction of the State of Pennsylvania and had become incorporated into the general mass of property of the respective States in which it was located.

Second. That it was not the intention of the statute either as expressed, or as construed by the Courts of the State in other cases, to tax tangible property permanently beyond the limits of the State and which had acquired a situs for taxation and was actually taxed in another State or States.

Third. That the fact that the coal was originally mined in Pennsylvania does not confer upon that State the power to tax it after it has been permanently removed therefrom, transported into and become part of the general mass of property of another State.

Fourth. That the attempted collection of a tax upon property under such circumstances is in violation of the commerce clause of the Federal Constitution.

Fifth. That, in any event, the attempted taxation, by the State of Pennsylvania, of coal which has become part of the general mass of property of another State, is in violation of a necessary implication of the Federal

Constitution which restrains the power, authority and jurisdiction of each State to subjects within her territorial limits.

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Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

October Term, 1904.

No. 208.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Plaintiff in Error.*

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT IN BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANT IN ERROR.

This case involves an examination of the tax laws of Pennsylvania and the decisions of her courts in interpreting and expounding them. A strong effort is made

by the plaintiff in error to induce this Court to reverse a well-considered judgment of the court of last resort in the State, embodying after two arguments the unanimous opinion of six justices (one judge being absent), affirming a former, recent, unanimous opinion of seven justices, constituting the entire Court, based on a long line of State decisions, the stability of which ought not to be disturbed except for grave and manifest error from a federal point of view.

I

The tax claimed is not a tax directly laid upon tangible property situate outside of the State, but is a capital stock tax imposed directly upon the capital stock of a Pennsylvania corporation at a fixed rate of five mills upon each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, owned by the company, franchises and property of other kinds.

There is an ingenuity of obscurity in the statement of the case and in the argument by which it is supported.

Thus, at the very outset of the paper book of our opponents, the loose, and therefore misleading, statement is made that the Pennsylvania revenue statute "taxes the property of domestic corporations— 'having capital or property employed or used in this Commonwealth,' " and the very first proposition advanced in the argument is that "The tax claimed is a tax on property." Unless caution is used, the inference might be drawn that the tax claimed was a specific tax laid upon a specific article of property as such; whereas the tax claimed is a tax upon capital stock *"at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock,, including as well their bonds, mortgages and moneys at interest as their franchises and property of other kinds:"*—that is, the tax is upon capital stock at a fixed rate of its actual value, into the

computation of which certain items enter, which are fairly to be spoken of as the property of the corporation. It is in this sense only that a tax on the capital stock of a corporation is a tax on property, but it is a tax on its property *only in the sense that it is a tax on capital stock representing franchises and* assets including its properties. *Com.* v *N. Y. P. & O. Railroad, 188 Pa. St., 185.* As was said by Mr. Justice Brown in *Com.* v. *Penn. Coal Co., 197 Pa., 553:* "Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached *through* the tax imposed directly upon the stock, the value of which is ascertained, in the first instance, as directed by Act of Assembly."

There is no specific tax laid on any item of property. This appears from so much of the preamble of the Revenue Act as is quoted in the third paragraph of page 10 of the paper book of the plaintiff in error. It also appears, from the 4th section of the act, as set forth on pages 10, 11 and 12 of the same paper book, that the whole object of the report required by the statute is to enable the State officers to truly estimate and appraise *"the capital stock of the company at its actual value in cash."*

This is equally clear from Section 5 of the act as set forth on pages 13 and 14 of the same paper book. Instead, then, of its being a tax directly laid on the property of corporations having capital stock, it is more proper to say that it is a tax on the capital stock of corporations having property; and that as such, and in this sense only, is it a tax on corporate property and assets including its franchises. This is made still

further manifest from the fact that the first section of the Revenue Act of 8th of June, 1891, (*Laws of Pennsylvania, pp. 229 and 230 et. seq.*) specifically deals with taxation of personal property for State purposes, and the rate is fixed at four mills. In Pennsylvania the capital stock tax is popularly spoken of as "The Five Mills Tax" and the personal property tax is spoken of as "The Four Mills Tax." The two are distinct and should not be confused. It is the latter only which is in any sense of the term, popular or professional, *in rem*. The personal property tax is not involved in the present case. It is the former tax, the capital stock tax, "The Five Mills Tax" which alone is involved.

It is not meant by this argument to contend that a tax on the capital stock of a corporation is not a tax on its property in a certain sense, but the proper use of the phrase is established by the case of *Commonwealth* v. *N. Y. P. & O. Railroad, 188 P. S., 169,* in which the conclusion of law reached by Judge Simonton, a most learned expert in taxation matters, is stated on page 185 of the report:

"A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact which must be determined by considering the value of defendant's tangible property and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined."

This was confirmed by the Supreme Court in an opinion by Mr. Justice Dean, speaking as follows:

"The statute having thus, in express terms, declared the subject of taxation to be *all* the property of corporations having capital stock, and the settled interpretation by this Court of a tax on the capital stock of a corporation being, that it is a tax upon *all* the property of the corporation, it is clear that the learned Judge of the Court below committed no error in the first sentence of his conclusion of law, thus: 'A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises.'"

And the foregoing is to be read in connection with the most recent expression of the same Court: "Capital stock tax is a property tax, *but the property of the corporation,* for the purpose of taxation, *is reached through the tax imposed directly upon the stock.*" *Com.* v. *Penn. Coal Co., 197 Pa. St., 553.* Hence to guard against error and inexactness, it is proper to preface this argument by stating that:

A. There is a distinction between a tax on capital stock and a direct tax on personal property;

B. The tax complained of in this case is not a tax upon tangible property, but is a tax upon the actual value in cash of the capital stock of a corporation, into the value of which many items have entered besides the coal mined by, transported by and in the possession of the plaintiff in error for sale at the time of fixing the valuation of the capital stock by the State appraisers. In other words, the actual value in cash of the capital stock of a corporation is a question of fact and not of law, which must be determined by considering the

value of its property and assets of every kind, including its bonds, mortgages, and moneys at interest, and its franchises and privileges. Hence, to regard the tax in question as a tax upon coal, treated as tangible property and a tangible asset, specifically subject to tax, constitutes a conspicuous error in the argument of the plaintiff in error.

To emphasize the distinction between a tax on capital stock and a tax on personal property it is proper to set forth: *A;* a brief analysis of the taxing system of the State of Pennsylvania, and, *B;* a concise statement of the results attained under our decisions.

The caution to be observed is to guard against the misapprehension of considering the capital stock tax as a specific tax laid directly upon specific articles, entering into, representing and, in their aggregate, measuring the value of capital stock, which is *eo nomine,* made the subject of the tax.

A. Analysis of State Taxes in Pennsylvania

Classification of State Taxes.

The sources of revenue of the Commonwealth of Pennsylvania may be divided into two classes according to the method by which the revenues are collected, viz:

1. Taxes paid directly, or through other State officers, to the State Treasurer;

2. Taxes collected by county officers and by them paid to the State Treasurer.

Class I.

Taxes Paid Directly to the State Treasurer.

These are as follows:

1. Bonus on Charters. (Not involved in this case.)

2. *Tax on capital stock of corporations, or interests in limited partnership and joint stock associations.* Five mills tax. The tax in question.

3. Tax on corporate, county and municipal loans. (Not involved.)

4. Tax on the gross receipts of transportation, transmission and electric light companies. (Not involved.)

5. Tax on the stock of banks. (Not involved.)

6. Tax on the gross premiums of domestic insurance companies having capital stock, and on the premiums of foreign insurance companies. (Not involved.)

7. Tax on the net earnings, or income, of brokers, private bankers and unincorporated banks and savings institutions. (Not involved.)

8. Tax on the matured stock of building and loan associations. (Not involved.)

9. Excise tax on receipts of express companies. (Not involved.)

10. Escheats. (Not involved.)

11. Miscellaneous. (Not involved.)

(*Eastman on "Taxation for State Purposes in Pennsylvania," page 30.*)

Class II.

Taxes and Licenses Collected by County Officers and by Them Paid to the State Treasurer.

These are as follows:

1. Tax on personal property. (Not involved.)
2. Tax on collateral inheritances. (Not involved.)
3. Direct inheritance tax. (Not involved.)
4. Licenses. (Not involved.)
5. Tax on fees of office. (Not involved.)
6. Tax on writs, wills, deeds, etc. (Not involved.)

(*Eastman on "Taxation for State purposes in Pennsylvania," p. 146.*)

Class III.

Local taxation. (Not involved.)

This last class embraces taxation for *county* purposes, as taxes on real estate, houses, lands, lots or ground, ground rents, etc., personal estate, such as horses, mares, geldings, cattle; taxation in boroughs, taxation in townships, school taxes, road taxes, poor taxes. (*Eastman on "Taxation for State Purposes in Pennsylvania," page 235.*)

The argument in this case is concerned with item 2, italicized under Class I, and is not to be confused with item 1 under Class II., nor with any item of Class III.

B. Statement of Results Attained Under the Decisions.

The most important results attained by the decisions of the Supreme Court of Pennsylvania embrace the following principles:

The legislature has a general power of taxation which is necessary for the existence and preservation of the government.

It is one of the legislative powers conferred by the Constitution of Pennsylvania upon the General Assembly, and it may be exercised to any extent to which the State may choose to carry it, not in violation of the powers granted to the Federal government or the restrictions set forth in the State Constitution. (*Sharpless* v. *Mayor of Phila., 21 Penna. S. R., 160.*)

The legislature may tax the same subject once, twice or oftener. Such power is not prohibited by the Constitution; but, on the contrary, is conferred on that body by the general grant of power in the Constitution, the only feature required being that the intention must be clear.

(*Commonwealth* v. *Fall Brook Coal Co., 156 Penna. S. R., 488; Commonwealth* v. *Lehigh Coal & Navigation Co., 162 P. S., 603.*)

This power of taxation is so important that the State cannot surrender it. The third section of Article IX, of the State Constitution declares that, "The power to tax corporations and corporate property shall not be

surrendered or suspended by any contract or grant to which the State shall be a party."

We concede that, the power to regulate commerce between the States, being conferred on the Federal Government, such power cannot be interfered with nor such commerce regulated by State taxation imposed upon articles of commerce; and therefore a tonnage tax and a tax on gross receipts derived from interstate commerce, imposed by the State, were declared by the Supreme Court of the United States to be null and void.

(*Case of State Freight Tax, 15 Wallace, 232.*)

This however, was a case where the tax was expressly laid upon the freight carried.

So also we concede that property created under Acts of Congress and instruments or property used by the United States are not taxable by the State.

(*Retfuss* v. *Moore, 134 Penna. S. R., 462; Commonwealth* v. *Philadelphia Co., 157 P. S., 527.*)

We also concede that a legislature cannot go beyond the limits of the State for subjects of taxation. There must be jurisdiction over the property or person of the owner, otherwise the power cannot be exercised.

(*McCulloch* v. *Maryland, 4 Wheaton, 429; State Tax on Foreign Bonds, 15 Wallace, 300; Commonwealth* v. *Standard Oil Co., 101 Penna. S. R., 119.*)

It follows of course that persons or corporations must have a domicile in the State in order to be taxed,

and that if a thing be taxed the thing taxed must have a situs either actual or legal therein. Generally the situs of tangible personal property is where it is permanently located, and such property is taxable there, although the owner may reside in another jurisdiction; and as to intangible personal property its situs is at the domicile of the owner and the property is taxable there. The domicile of a corporation is the State of its origin. It cannot migrate to another sovereignty. Intangible personal property, owned by a foreign corporation doing business in this State is taxable in the State where the corporation was created, because the situs of the property is there; *such property owned by a domestic corporation is taxable here because its situs is here, the domicile of such corporation being within this State.*

There is nothing in any of these concessions which touch the argument in this case, and we mention them solely because our opponents have set them up as straw men. There is no tax laid directly on tangible property outside of our State limits, and it is only because of the persistency with which our opponents cling to the idea of a property tax in a wrong sense, that we repeat the thought.

An Important Principle.

We now call attention to a well settled principle as to tangible property; that at times it is to be treated as practically intangible because of its roving character; thus vessels engaged in foreign or interstate commerce have their situs at their port of registry and are tax-

able there, and shares of stock in national banks, located in this State, owned by non-residents of this State are taxable here. Vessels, if unregistered, have their situs for taxation in the State which is the domicile of their owner.

(*Commonwealth* v. *Standard Oil Co., 101 Penna. S. R., 119; Pullman's Palace Car Co.*, v. *Commonwealth, 107 Pa., 156;* affirmed in *Pullman's Palace Car Co.*, v. *Pennsylvania, 141 U. S., 18. Commonwealth* v. *American Dredging Co., 122 Penna. S., 386; Commonwealth* v. *Delaware, Lackawanna & Western R. R. Co., 145 Penna. S., 96; Commonwealth* v. *Pennsylvania Coal Co., 197 Penna. S., 551.*

The importance of this lies in the fact that while it is conceded that a direct tax cannot be laid on property situate outside of the State and which has never been within the State, and the value thereof must therefore be excluded in a computation of the value of the capital stock of a corporation, yet with regard to property which sprang into being from the loins of the State, and the legal domicile of which is still within the State because of its transitory character, the proceeds or value returning to the treasury of the corporation and necessarily enhancing the value of the capital stock, that value cannot be excluded in a computation of the actual value of the capital stock upon which the tax is laid.

And so the Courts have decided.

The cases of *Commonwealth* v. *American Dredging Company, 122 Penna. S., 386,* and of *Commonwealth* v.

Pennsylvania Coal Company, 197 P. S., 551, are specifically in point. In the latter, it was distinctly held that the value of coal which a Pennsylvania Mining Company had on hand in other Staes, and which it had shipped to such other States for the purposes of sale, and not to serve any permanent corporate purpose, could not be deducted in determining the value of the capital stock of such corporation for the purpose of taxation. And this latter case was again affirmed in *Commonwealth* v. *Delaware, Lackawanna & Western R. R. Co., Appellant, 206 Penna. S. R., 645,* being the case now under consideration.

THE NATURE OF A CAPITAL STOCK TAX.

In the light of the foregoing decisions it is now proper to consider the nature of the tax on capital stock. Corporations are taxed in various forms. The principal subjects of corporate taxation in Pennsylvania are capital stock, shares and franchises. The capital stock is the fund or property contributed by those who compose the corporation, which is used in carrying on the business of the corporation. The capital stock represents the property and is nothing except as it represents property. A tax, therefore, on capital stock is a tax on the property of a corporation but in the sense before explained; and this tax has always been levied upon capital stock according to the value of the property which it represents.

(*Commonwealth* v. *Standard Oil Co., 101 P. S., 119. Whitworth on Taxation of Corporations in Pennsylvania for State Purposes, Chapter I, Section 14, page 59.*)

An interesting history of the method by which this result was reached is set forth by Whitworth in his Work on "Taxation of Corporations in Pennsylvania for State Purposes," from page 59 to 140 inclusive. See also Eastman on "Taxation for State purposes in Pennsylvania," Chapter III, title "Tax on Capital Stock."

Without burdening this brief with a long list of authorities, it is sufficient to point out that the tax sought to be collected in this case is the five mills tax upon each dollar of the actual value of the capital stock of the corporation in question under the terms of Section 4 of the Act of 8th of June, 1891 (Penna. L. 229), and Section 1 of the Act of 8th of June, 1893, (Penna. L. 353). An analysis of the decisions relied upon by the Court below in the opinion appealed from will be sufficient for the purpose.

The leading case is that of *Commonwealth of Pennsylvania* v. *New York, Pennsylvania & Ohio R. R. Co., Appellant, 188 P. S., 169.* This was an appeal from a tax settlement. An opinion was delivered by Simonton, P. J., of the Dauphin County Court, a recognized authority on the subject of State taxation. He elaborately reviews the entire history of State taxation up to the year 1898 since which time there has been no revenue act passed altering the principles or the application of principles therein stated. On page 185 of 188 Penna. State Reports, he reaches the following conclusion of law:

"A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital

stock is a question of fact which must be determined by considering the value of defendant's tangible property and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the encumbrances on its property and franchises is also a relevant fact from the value so ascertained and determined."

This opinion of the learned Judge in the lower Court was sustained by an opinion by Mr. Justice Dean, of the Supreme Court of the State, on 17th of October, 1898.

This case was followed by *Commonwealth* v. *Pennsylvania Coal Company, 197 P. S., 551,* in which it was held that the value of coal which a Pennsylvania mining corporation *has on hand in other States, and which it had shipped to such other States for purposes of sale, and not to serve any permanent corporate purposes, cannot be deducted in determining the value of the capital stock of such corporation for the purpose of taxation.* The Court, in a unanimous opinion delivered by Mr. Justice Brown, said:

"Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached through the tax imposed directly upon the stock, the value of which is ascertained in the first instance as directed by the Act of Assembly."

This is the latest expression of opinion on the part of the Supreme Court of Pennsylvania, and effectually disposes of the contention of the counsel for the plaintiffs in error in their first point, by showing in what sense the phrase "property tax" is to be understood in considering the nature of the capital stock tax sought to be recovered.

II.

The capital stock tax claimed is not a tax laid, or sought to be laid, directly upon tangible property beyond the territorial limits of Pennsylvania or the protection of her laws. Deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property which has not acquired a foreign situs, because of its return in value to the treasury of the company. It is the value of the stock that is taxed and not the property representing that value.

The argument of our opponents, under their second point, is tainted by the fundamental vice which underlies their first proposition. The terms in which they state it, if taken as they put it, lead to the conclusion that the tax claimed is a specific tax imposed upon tangible property, outside of the borders of the State. This is wholly inaccurate.

The facts are as follows:

The defendant, the Delaware, Lackawanna & Western Railroad Company, is a corporation of the State of Pennsylvania. It is engaged in the operation of a railroad and the mining, shipping and sale of coal. Its mines are situated in Pennsylvania, and it draws its wealth chiefly from this source. The par value of its capital stock is $26,200,000. It has made large profits, and owns much property, so that the officers of the company returned and appraised the value of the capital stock, representing its property, assets and franchises, between the first and fifteenth days of November, 1899, at $48,470,000. Upon this appraisement the Auditor

General and State Treasurer settled an account for tax amounting to $242,350. The officers of the company claimed a deduction from the appraised value of its capital stock, of $1,702,443, on the ground *that that sum represented coal* belonging to the company which was located outside of Pennsylvania, in New York, Illinois and other States, but the claim for deduction was disallowed by the Auditor General and from the settlement made an appeal was taken by the company to the Court of Common Pleas of Dauphin County.

The points reserved for the opinion of the Court related *not to a tax on coal, but to a tax* on the sum of $1,702,443, *"being the value of the coal."* Transcript of Record, p. 13.

The Commonwealth refused to allow the deduction claimed, because, while it is true that such coal as had been shipped from our own State to docks and storehouses at points outside of the State, and awaiting transportation to purchasers thereof, is tangible property, and was, at the time of its appraisement, physically located outside of the State, such location was not permanent nor intended to be permanent: and because the *value of the coal* returning to this State entered into and enhanced the value of the capital stock.

The Courts have held that tangible property, *permanently* located outside of the State, *for the use or benefit of the corporation,* is exempt from valuation for taxation, *but in no instance have the Courts decided that deductions should be allowed for the property of a corporation which is in transit to the place of its destination.* There has been no sufficient reason shown why coal that has been shipped and stored in warehouses, while it is

in transit to purchasers, should be placed in a position different from that of coal which is loaded in cars in the State or stored within the State awaiting shipment to purchasers outside of the State, *so far as its effect upon the value of capital stock is concerned.* On the contrary, the Courts have uniformly held that the value of such property shall not be deducted from the total value of the company's stock in making an appraisement for taxation.

The case now pending comes clearly within the rules stated by Mr. Justice Paxson in the case of *Commonwealth* v. *American Dredging Company, 122 P. S., 386,* wherein it is said:

"It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their situs for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered: *Pullman Palace Car Co., 29 Fed. Rep., 66; Hays* vs. *Pacific Mail Steamship Co., 17 How., 596.* These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another State as to be liable to taxation under the laws of that State."

An examination of this case shows that the Court was dealing with a capital stock tax, and that the sense in

which a tax on property is spoken of must be the sense explained in our first proposition.

The learned Court in that case drew the line between property permanently located in another State and liable to taxation in that State and property temporarily in another State and not subject to taxation there: *i. e,* the value represented by the property. In that case the facts were that certain vessels were registered and certain vessels were not registered, and that where vessels were not registered, they were to be taxed. The situs of taxation is the domicile of the owner.

In the case of *Commonwealth* v. *Montgomery Lead and Zinc Company, 5 Pa. C. C. Reports, p. 89,* the principle of taxation in reference to tangible property of corporations is stated in the syllabus as follows:

"Section 4 of the Act of June 7, 1879, does not tax so much of the capital stock of domestic corporations as represents tangible property situate without the State and there employed for corporate purposes."

The case was that of a mining company, whose whole capital was invested in mining lands in Missouri. and its entire income was drawn from that source. It will be observed that the decision was based upon the principle that tangible property, permanently held outside of the State and employed there for corporate uses, was exempt from valuation for taxation in this State. This follows the principle announced by Mr. Justice Paxson in the case above cited. The tangible property belonged to the corporation, was permanently outside the State, and was subject to taxation in the jurisdiction where such tangible property was lo-

cated. It also appeared that it must not only be tangible property owned *permanently* by the corporation, *but that such property must be employed there for corporate purposes.* That case did not have in contemplation tangible property of a corporation that was simply being sent to its point of destination. All these cases contemplate tangible property to be permanently attached to the corporation and used and employed for corporate purposes.

To the same effect is the case of *Commonwealth* v. *Standard Oil Company, 101 P. S., 119.* It is to be observed that this was the case of a corporation foreign to Pennsylvania. The Court announced the principle that so much of the tangible property of corporations as was situated in other States, and there employed in their corporate business was not liable to valuation for taxation here. The rule in both these cases is based upon the principle that the tangible property must be permanently owned by the corporation and that it must be employed in the corporate business.

For this reason it has been held that the cars, rolling stock and other personal property of railroad companies, located permanently outside the State, and there permanently used in the transaction of the corporate business, should be deducted from the valuation of the capital stock of a corporation located in this State. In all of these cases, however, the deduction for real estate and personal property, permanently located outside the State was allowed on the principle that as all of these elements of value have entered into the valuation of the capital stock of a corporation in our State, and are permanently held outside of the State,

there should be a deduction made from the valuation of the capital stock in our State for purposes of taxation.

We contend that the door should not be opened any wider than it is for the purpose of allowing these deductions. The coal of the defendant company, for which a deduction is asked, is located in New York, Illinois and other States. But it came from Pennsylvania. It has all been shipped from mines in Pennsylvania to these points in transit to the purchasers. We do not understand the facts to be that a capital stock tax is imposed in any of the States named for State purposes. This we will notice specifically under our third point. Aside, from the question of the right to tax the coal in other States, it may be fairly contended that all that the Commonwealth of Pennsylvania is attempting to do is to place a tax upon the capital stock of the Delaware, Lackawanna & Western Railroad Company. It is right to take into consideration every element that enters into the valuation of that capital stock. That which makes the capital stock valuable is the coal which it mines and ships. The coal is taken from the bowels of Pennsylvania. The business of mining and shipping coal is going on all the while. Coal is being constantly shipped to Hoboken, Chicago and other places. From these points it is distributed, reshipped to other points and finally sold. We may fairly infer that, from the time the coal leaves the mines until it is shipped to these points and sold, and the proceeds of such sales finally return to the treasurer of the corporation, not more than from thirty to sixty days will elapse. Certainly, when the money from these sales comes back to Pennsylvania, it enhances the value of the capital stock, and

no deduction then would be claimed or allowed in the valuation of the capital stock. The very coal, for which the defendant now claims a deduction, has long since been sold, and its value in money returned to the treasurer of the corporation; and hence it has been the material thing that has entered into the valuation of that capital stock. The mere fact that the company has established its treasury in New York cannot affect the question. That was for its own convenience. It is a Pennsylvania corporation, and its treasury is at the domicile of corporate origin.

No Deduction can be Allowed for Coal so Situated.

But this question has been recently squarely raised and decided by the State Supreme Court in favor of the Commonwealth in the case of *Commonwealth* vs. *Pennsylvania Coal Company, 197 Penna. S., 551.* Mr. Justice Brown clearly states the principle as follows, January 7, 1901:

"The capital stock of the Pennsylvania Coal Company was appraised at $17,000,000 for the purpose of taxation. From this sum certain deductions were allowed by the Commonwealth, leaving the taxable value of the stock at $15,840,000, and from this still further deductions or exemptions are claimed by the appellant. Capital stock tax is a property tax, but the property of the corporation, for the purpose of taxation, is reached through the tax imposed directly upon the stock, the value of which is ascertained, in the first instance, as directed by the Act of Assembly. When the actual value of the capital stock is so ascertained, deductions or exemptions are necessarily allowed, from time to time, by the Commonwealth in determining the real sum upon which the tax ought to be assessed against the corporation; and the questions raised on this appeal are,

whether the mortgages on property outside the State, and the coal shipped to foreign points, should be taxed, or deductions allowed on their account.

"The two claims for exemption pressed by the appellant are for $418,208.70, the value of coal which it had on hand in New York, New Jersey, Illinois, Wisconsin, Minnesota and Canada, and $450,000, unpaid purchase moneys for properties which it had sold in New York and New Jersey, secured by mortgages to that amount. The coal had been shipped to the several States and country named for the purpose of sale. It was, it is true, of a tangible character, but, as the property of the coal company, it was neither to be permanently located where received nor intended permanently to serve any corporate purpose of its owner. It was an asset of the company for immediate sale, and not for use, temporary or permanent. The ownership in it to-day was, that it might be sold to-morrow. If it had been tangible property of the corporation, employed in its corporate business, the deduction claimed ought to be allowed: (*Commonwealth* v. *Pennsylvania Coal Company, 41 Leg. Int. 125,* the judgment in which case we affirmed); but it was not so employed, and what we said in *Commonwealth* v. *American Dredging Company, 122 Pa. 386,* of the dredges, tugboats and scows belonging to a domestic corporation, but which had been built outside of the State, and had never been within it, applies with more force to this item of coal, and it is conclusive of the Commonwealth's contention that no deduction ought to be made for it. It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business, it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The question here is simply one of a proper valuation by this State of the capital stock of the appellant for the purpose of taxation, and is not controlled by *Brown* v.

Houston, 114 U. S. 622, where other questions than that before us now were raised under the contention as to the right of the State of Louisiana to tax, by its general laws, coal mined in Pennsylvania (upon which the tax had been paid here) and shipped to New Orleans, to be sold on account of the owners in Pennsylvania.

"The mortgages held by the appellant for the unpaid purchase moneys for properties sold by it in New York and New Jersey, are to be treated in this proceeding as ordinary mortgages securing money loaned. They themselves do not go to make up the assets of the corporation in determining what value shall be placed upon its capital stock, but the money which they were given to secure, and which it had, or will have, the right to collect, imparts the value. They represent, and are but security for, the debts or obligations held by the corporation, which are personal property and intangible things, having as their situs the domicile of the owner, and therein taxable: *Commonwealth* v. *American Dredging Company, supra,* and *Commonwealth* v. *Del. L. & W. R. R. Co., 145 Pa., 96.* Besides, by the very words of the Acts of June 1, 1889, and June 8, 1891,—'all moneys loaned or invested in other states, territories, the District of Columbia, or foreign countries'—they are taxable here. As well might deduction be allowed for actual cash in the treasury of this company as for these mortgages representing money, which, sooner or later, will get into the treasury. The views of the learned Court below having been correct on the questions involved, the judgment is affirmed."

It will be seen that it is this case upon which the Court, in the opinion appealed from, relied, by which it was controlled, and which it solemnly affirmed. It is important to observe that the facts in the two cases are almost precisely identical, and it is also important to observe that the vice of the argument of the plaintiff in error is in the assumption that the coal in question has been permanently located outside the State of Pennsyl-

vania for the use or benefit of the corporation, has become incorporated with the property of other States, and has there been taxed. This is a misapplication of our decisions. While it may be conceded that our Courts have held that tangible property, permanently located outside the State for the use or benefit of the corporation, is exempt from taxation, yet in no instance have they gone so far as to allow deductions in the computation of the value of the capital stock for the property of a corporation that is in transit to the place of its destination, or which, when sold, returns to enhance the value of the capital stock. *In fact it may be fairly contended that before it leaves the State its value enters into the capital stock.*

In the case under consideration the Court of Common Pleas of Dauphin County followed as a binding authority the opinion just quoted in full, and the Supreme Court of Pennsylvania, after argument and re-argument, affirmed in distinct terms the case of *Commonwealth* v. *Pennsylvania Coal Co., 197 P. S., 551,* as properly stating the rule. The findings of fact and the opinion of the Court of Common Pleas in the case under consideration appear in the Transcript of Record, page 27 to 33 inclusive, and the opinion of the Supreme Court of Pennsylvania, now appealed from, appears upon page 43 of the Transcript of Record. An examination of both opinions will show that the case was considered by both Courts to be entirely within the lines of the rule laid down by the highest Court in Pennsylvania. Judge Weiss, in the Dauphin County Common Pleas (Transcript of Record page 30), said:

"The coal was here as real estate, until it was mined. It became, and remained, personal property from that time. *As such it entered into the value of capital stock.* It was transported to points in other States for temporary storage and immediate use. It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage back to its original domicile.

"It is this itinerant trait which likens the case to the dredges, tugs and scows in *Commonwealth* v. *American Dredging Company, 122 Pa., 386,* employed beyond, but taxed within, the boundaries of this State; and subjects the coal to taxation in the parent jurisdiction, from whence it ought to go exempt from the imposition of further burdens elsewhere for State purposes for the year specified.

"That cannot be said to be permanent or have fixity, which is voyaging from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuits or business of the owner. They may with propriety be said to be located there permanently.

"But coal mined or unmined, as well as the proceeds

of the sale of the produce, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are co-related * * * * * * * * * * *

"There was no assessment of a tax upon the real estate lying beyond the limits of the State, upon which the coal was placed, because it was permanently located beyond the taxing jurisdiction of the Commonwealth, and never subject to the visatorial power of the auditor general or any other authority.

"But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the actual valuation and assessment was paid thereon, is quite a different proposition.

"The company is required not only to estimate and appraise its capital stock at its actual value in cash between the first and fifteenth days of November of each year, but it must be not less 'than the average price the said stock sold for during the year ending with the first Monday of November,' 1899, 'and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus of sinking fund.'

"After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing, to-morrow —fugitive ever until it reaches the torch.

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it; and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

"This rule is also in accord with the dictates of equity, for by it the value of the produce as represented

by the capital stock, can be ascertained with almost mathematical exactness.

"In *Commonwealth* vs. *Railroad Co., 145 Pa., 104,* the Supreme Court, comenting upon the case of *Commonwealth* vs. *American Dredging Company, 122 Pa., 386,* says: 'The dredges which were the subjects of the controversy were taxable at the situs of the company, for the reason that although wholly used outside of the Commonwealth, they did not remain in any one place long enough to render them liable to taxation there.'

"Having reached the conclusion that the shipment of the coal into other States for the purpose of sale does not give it the character of permanency there, so as to exempt it from taxation here, and being also of the opinion that even if the testimony had actually disclosed the fact that the coal shipped into the other States was taxed for the same year prior to its disposition and the tax paid by the company, it would still be taxable by this State, there remains only the duty to direct judgment to be entered upon the reserved question in favor of the Commonwealth and against the defendant company for the sum of $8,512.22, eight thousand five hundred and twelve and twenty-two one-hundredths dollars, with interest from July 8, 1900, unless exceptions are filed as required by law, as follows, viz:

Tax on coal, ...	$8,512 21
Interest at 12 per cent. from July 8, 1900, to May 22, 1901, ...	945 89
Attorney General's commission, ...	425 61
	$9,883 71."

OPINION OF THE SUPREME COURT.

The Supreme Court, by Mr. Justice Brown (Transcript of Record, page 43) spoke as follows:

"This case is not distinguishable from *Commonwealth* v. *Penna. Coal Co., 197 Pa., 551,* and is controlled by it. Our attention is called to the fact that, in the

present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. A sufficient answer to this is the Court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. *As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax.* When shipped out of the State it is for the purpose of sale, and not for permanent storage. As fast as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. 'It is not a thing,' as the learned judge below very properly said, 'used in the prosecution of the business of the company.' The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers."

The second point of the counsel for plaintiff in error is that it was never within the intent nor the power of the legislature to impose a tax upon tangible property not held within the territorial limits of the State. We concede that. But we claim that this tax is not upon

tangible property outside the State. We claim the right to tax the capital stock representing the value of this coal, because it is owned by this company, mined in Pennsylvania, is on its way to a foreign market, but is still owned by this company. *Moreover before the coal starts on its journey, as soon as it is mined, it enters into the value of the capital stock.* When sold the profits come back into this State into the hands of a corporation of this State, no matter where its treasury may be located. We claim that we have a right to consider the value of the coal as having entered into the capital stock as soon as it is mined; that is to say, we have the same right to treat the coal as one of the items that enter into the value of the capital stock, as we have to treat the money realized from the coal when it has been returned to the State and is in the surplus fund. That is the point we stand on. There is nothing in the long line of cases cited by our adversaries which we do not concede. But the cases cited do not affect our proposition *that deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property* which has not acquired *a foreign situs, because before the property has even started on its pilgrimage, its value has entered into the capital stock.*

III.

We do not concede that the coal in question was permanently located and actually taxed in States other than Pennsylvania; nor do we concede the pertinency of the case of Brown vs. *Houston, 114 U. S. 622, and the authorities cited in support and confirmation thereof.*

In this connection it is important to observe that the parties are concluded by the findings of fact of the Court below which, under the Act of the Pennsylvania Assembly of April 22, 1874 (P. L. 109), sustained in *Commonwealth* v. *Westinghouse Electric & Manufacturing Company, 151 P. S., 265,* have the effect of a verdict of a jury. The agreement of counsel (Transcript of Record, page 13) reserved for the consideration of the Court the capital stock tax upon $1,702,443, "being *the value* of coal held and owned at points in States other than Pennsylvania" and "the question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the Court. If the Court shall be of the opinion that, upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant."

The Court, in its findings of fact and opinion, found (Transcript of Record, page 30):

"The coal was here as real estate until it was mined. It became, and remained, personal property from that time. *As such it entered into the value of capital stock.* It was transported to points in other States for *temporary storage and immediate sale.* It is not a thing used in the prosecution of the business of the company. It serves no corporate purpose. It is a commodity dealt in by the company. The product which is taken out of the earth in this State, and which, as such, entered into the measure and determination of the value of the company's property for taxable purposes, is removed out of the State for the sole purpose of a ready sale. It may be, and doubtless was, transported from there to other States and places after it was sold. But wherever sold, the proceeds eventually came back to the State from whence the mined product was shipped for the purpose of sale, and where its officers and treasurer, in contemplation of law, reside.

"The coal was taken from its taxable habitat, imbued with the nomadic instinct, ordained to wander far and wide through other States seeking and finding a commercial mart, and, in its changed form, sent on the pilgrimage to its original domicile * * * * * * * * That cannot be said to be permanent or have fixity, which is voyaged from place to place for a market. Horses, cattle and other movable chattels, when transported to another jurisdiction, are ordinarily kept and used there for some purpose attendant upon the pursuit or business of the owner. They may with propriety be said to be located there permanently. But coal mined or unmined, as well as the proceeds of the sale of the product, are protected by the laws of this State, and must accordingly respond to the burden of taxation in this State. Protection and taxation are correlated * * * * But the dismantling of real estate situate in this State, and the transportation of the severed fragments into other States for the avowed purpose of sale, even though placed there before the

actual valuation and assessment was paid thereon, is quite a different proposition * * * * * After it leaves the parent ledge or vein, it is a constantly moving commodity, never the same in quantity or identity during any week, month, year, or years, going to its dumping pile to-day, departing to-morrow * * * * fugitive ever until it reaches the torch."

As to the payment of taxes the trial Judge said: (Transcript of Record, page 31)

"All taxes assessed against the company for 1899 in other States on coal located there have been paid, according to what the secretary of the company says he believes and so far as he can now recall, *but it does not appear that said taxes were not for local or municipal purposes and not for State purposes, and it does appear that the taxes laid were paid without contest.*"

The Supreme Court of Pennsylvania (Transcript of Record, page 43) says:

"Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases (the reference here is to the case of *Commonwealth* v. *Pennsylvania Coal Co., 197 P. S., 551*). A sufficient answer to this is the Court's finding of fact that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest."

Mr. Truesdale, the president of the railroad company, sets forth in his affidavit no facts whatever, but simply states that he has read the sworn statement of the secretary, concurs therein and desires that the same may be considered with a like effect as if the contents were by himself recited.

An examination of the affidavit of Mr. Chambers, set forth on page 14 of the Transcript of Record, discloses a reference to the payment of taxes which, in express terms, relates to the real estate, local in its character, assessed and taxed upon the real estate in Pennsylvania for county, city, borough, school, road, poor and other purposes. This falls within Class III of the Analysis of Taxes given under the first proposition in our argument. No real estate tax is imposed by the State of Pennsylvania. Such taxes are purely local and municipal in their character and do not go into the State Treasury.

The other reference by Mr. Chambers to the payment of a tax is contained in his additional affidavit, set forth on page 26 of the Transcript of Record, and is limited to the taxes mentioned in his former affidavit. He says: "Referring to taxes mentioned in my former affidavit * * * * * I desire to add that they have been paid, I believe." He then adds:

"The company is not contesting, but on the other hand concedes the right of New York, New Jersey, Michigan and Illinois, and the other States, and Canada, to tax coal located and stored in said States. The only question pending at present is as to the amount of valuation in the State of New York for 1899, and as soon as that valuation is definitely fixed the company will pay the tax without any question as to the authority of the State to levy the same. All taxes, so far as I can now recall, State and local, which have been assessed against this company for 1899, in any of the States mentioned, have been paid."

All of this is exceedingly vague and inconclusive and justifies the finding of the learned Court that it did not

appear that the taxes were not for local or municipal purposes and not for State purposes, nor did it appear that the taxes laid were paid without contest. (Transcript of Record, page 31). This is affirmed by the Supreme Court in saying "It does not appear whether they were paid for State, local or municipal purposes, and it appears they were paid without contest." (Page 43).

The only remaining reference in the affidavit of Mr. Chambers is to be found on page 22 of the Transcript of Record, where he says:

"The said coal, when shipped from Pennsylvania, was destined to said points in other States with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same and was so taxed for 1899."

This ignores the fact that where the coal was mined its value entered into the capital stock, and that though the coal itself never returned, yet its value returned to the treasury.

It does not appear where it was taxed or by whom it was taxed or for what purposes it was taxed, and the statement that the company is annually taxed "upon or respect to the same" is equally vague, and it cannot be ascertained whether it was a specific tax, directly laid upon coal as tangible property within the boundaries of the taxing State, or whether there was a tax upon capital stock representing property employed in the taxing State. It would have been easy for the company to

produce tax receipts if they have paid a tax on nearly two million dollars worth of coal and put the receipts in evidence. In view of the vagueness of the affidavits and the lack of clear, specific proof, and in view of the findings by the Court and their affirmation by the Court above, counsel for the Commonwealth of Pennsylvania cannot concede the proposition that the coal was permanently located and actually taxed in States other than Pennsylvania.

But even conceding, for the sake of argument, that a tax has been imposed in the other States, that cannot preclude the Commonwealth of Pennsylvania from seeking to impose a capital stock tax and determine its value by considering the value of the coal represented by such capital stock. In his affidavit (page 22, Transcript of Record) Mr. Chambers says: "When the coal thus kept in stock in the States of New York, Illinois and other States outside of Pennsylvania is sold the proceeds are returned to the company's treasury in the city and State of New York." Much is made of this by counsel for the plaintiff in error, but they overlook the fact that the railroad company is not only a corporation of the State of Pennsylvania, authorized to operate a railroad, but that it is also a mining company, authorized to mine and sell coal, and that the location of its treasury in the City of New York is a privilege granted for its own convenience but which cannot effect a legal change in the domicile of the corporation, which is clearly the domicile of its corporate origin.

BEFORE THE COAL HAD STARTED ON ITS JOURNEY, THE RIGHT OF PENNSYLVANIA TO TAX CAPITAL STOCK, INTO THE VALUE OF WHICH THE VALUE OF THE COAL HAD ENTERED, HAD ATTACHED AND COULD NOT BE DIVESTED.

In dealing with the question whether, even if there were a tax imposed in other States upon coal treated as tangible property incorporated with the general property of the taxing State, the learned Judge in the Dauphin County Common Pleas (Transcript of Record, page 31) said:

"Taxation there would not suspend the right to tax property located here and forming part of a mass *which, as well before severance from the land as after, and of course, prior to its transportation elsewhere, entered into and affected the value of the capital stock,* and which was so deposited elsewhere, for a mere temporary and not a permanent, purpose. *Primary jurisdiction to tax the coal attached here and its voluntary carriage into other States for sale, does not detach it, even if by law of those States it is again taxable there.*"

Again the learned Judge (Transcript of Record, page 32) says:

"By the comity which obtains among the several States, and which has the force and sanction of law, property situate as this is, *ought to be taxed by the sovereign in whose domain it is produced, and who granted the franchise to produce it;* and the product transported for sale to other States ought to be exempt from further taxation there for the State purposes.

"This rule is also in accord with the dictates of equity, for by it the value of the product as represented by the capital stock, can be ascertained with almost mathematical exactness."

All this is of the very marrow of the question. The Supreme Court (Transcript of Record, page 43) said:

"Our attention is called to the fact that, in the present case, taxes were assessed and paid in the States where the coal was stored awaiting sale, and we are asked to regard the payment of those taxes as creating a distinction between the two cases. (*Commonwealth* v. *Pennsylvania Coal Company, 187 P. S., 551,* is the case alluded to). A sufficient answer to this is the Court's finding that it does not appear whether they were paid for State, local or municipal purposes; and it appears they were paid without contest.

"One of the branches of this appellant's business is the mining and sale of coal. To enable it to sell this commodity in other States some of its tangible property must be permanently in them, and so much as is so located and permanently serves the corporate purpose of the company, which is the sale of its coal, is not taxable here. But the coal itself is not such exempted property. *As soon as it is mined here it enters into the value of the company's capital stock, upon the actual value of which the Commonwealth is entitled to her tax.* When shipped out of the State it is for the purpose of sale, and not for permanent storage. As far as it is received at the wharves and in the yards the company aims to turn it into money, which will pass at once into its treasury. 'It is not a thing,' as the learned judge below very properly said, 'used in the prosecution of the business of the company.' The business is prosecuted that the coal may be sold, and the exemption from taxation does not extend to the commodity itself, but is confined to such of the corporate property as must be used outside of the State to enable the company to conduct its business. This is the limit of exemption from taxation here, and the appellant's coal shipped to other States for sale was properly taxed by the Commonwealth's officers."

INAPPLICABILITY OF CASES CITED BY PLAINTIFF IN ERROR FROM UNITED STATES REPORTS.

It is strangely supposed that the case of *Brown* v. *Houston, 114 U. S., 622,* is an authority conclusive against the right of the State of Pennsylvania to insist upon a capital stock tax. The understanding put upon that case by the learned trial judge was that it had there been decided that a tax laid by the State of Louisiana pursuant to a general law upon coal transported into that State from Pennsylvania, was not a tax violative of the provisions of the Constitution of the United States relative to duties on imports or exports and regulating commerce among the several States. Neither *Brown* v. *Houston* nor any of the cases cited in support of it are authorities to the effect that a tax laid upon a commodity brought from one State into another State, and becoming mixed with its general property, and therefore sustainable as a local tax, would operate as a prohibition against the imposition of a tax of the nature sought to be established here in the State from which the commodity was exported. The tax legislation of one State cannot operate as a prohibition against the tax legislation of another State. Besides, if there be any conflict, the right to tax primarily existed in the State where the product was mined. Besides what is spoken of in *Brown* v. *Houston* was a specific tax on property in Louisiana. This kind of a tax cannot operate to the destruction of a capital stock tax in Pennsylvania, which attached before the coal had started on its journey.

Qui prior tempore, prior jure. So far as equities are concerned, those of Pennsylvania are the stronger.

It cannot be contended that the Revenue Act of Pennsylvania of 1891 (the revenue act under discussion) imposes a duty upon exports. It cannot be contended that it imposes a duty upon imports. It cannot be pretended that it is a regulation of commerce, or that it interferes with commerce between the different States. Neither in terms nor in substance does it pretend to be a regulation of commerce, nor can it have such an effect. The language of Mr Justice Bradley, quoted from *Brown v. Houston*, as well as the language of Mr. Justice Field, quoted from the *Pittsburg Coal Co.* v. *Bates, 156 U. S., page 588*, has no reference to the facts of the present case, except to illustrate the impossibility, as well as inaccuracy, of the contention that the State statute of Pennsylvania amounted to a regulation or a restriction upon commerce between the States; for it is well established that if a State statute is simply an exercise of local administration, under the general taxing power, it is, even though it incidentally affects the subjects of commerce, entirely proper as being within the power of a State until Congress should see fit to interfere and make express regulations on the subject.

The State statute under consideration is not a tax imposed upon coal as a foreign product, nor is it a tax imposed upon the product of another State, nor is it a tax imposed upon an export to another State, nor is it a tax imposed upon an article of commerce in a state of transit through the State to some other place of destination. Hence, such cases as those of *Brown* v. *Hous-*

ton, Coe v. *Earl, 116 U. S., 517; Pittsburg & Southern Coal Co.* v. *Bates, 156 U. S., 577; Kelly* v. *Rhoads, 188 U. S., 1,* and *Diamond Match Co.* v. *Ontonagan, 188 U. S., 82,* have no application. The case of *United States* v. *Knight, 156 U. S., 1,* is equally wide of the mark as that case related solely to the question of a monopoly charged to be created in violation of an Act of Congress.

IV.

No Federal Question is Involved.

It is difficult to see the Federal aspects of the question. Counsel do not state those features boldly or in terms. Nor is it easy to understand the citation from the opinion of Chief Justice Marshall in the case of *McCulloch* v. *Maryland, 4 Wheaton, 316.* All that Chief Justice Marshall said may be conceded. In its application to the case then before him, which was an effort on the part of a State to tax, and, possibly, tax out of existence a creature of the national government what he said was entirely proper, but in the present case the citation is aimed at nothing. It is a shot into the open air. To argue that a power to tax involves the power to destroy, when predicated of State legislation aimed at the destruction of a creature of the Federal government, is proper, but when spoken of in connection with the power of a State to impose a capital stock tax upon a corporation of its own creation, and to use such a citation as an argument destructive of the inherent and inalienable rights of State sovereignty when exercised upon proper subjects, is to deny to the State the exercise of a right to live. We do not deny the right of other States to tax coal, if it becomes a part of their own State wealth. It is not clear in the present case that they have done so, but, had they done so, to say that a tax imposed elsewhere upon a specific article of property destroys the right of

Pennsylvania to impose a capital stock tax, such as has been explained, upon one of her own corporations, is to say that she must yield her right to live, and her very means of living to the power of every other State legislature, and pour her blood by transfusion into their veins and bleed to death for their benefit. The coal, when mined, was torn from the soil of Pennsylvania, it became a part of the wealth of a corporation chartered by her with the right to mine. No State tax is imposed by Pennsylvania upon real estate. Such taxes are exclusively local, but the coal when mined entered into the value of the capital stock of the corporation. If the mines were exhausted or the coal, still in transit or at rest, wherever located, were destroyed before sale, it would depreciate the value of the stock and a fall in the market price of the stock would undoubtedly take place. If the coal be sold and in transit, or if sold while at rest and not yet delivered, the book credits which were given, the bills receiveable and the accounts collectible would still belong to the company and enhance the value of the stock. It is not the coal which is the object of this tax, but it is the value of the coal represented by the capital stock which is sought to be reached. Coal, once mined, can never be replaced. It does not grow nor is it capable of replenishment. If a coal company can escape taxation on its capital stock on the ground of the coal being in transit, so would it be with oil and gas and iron, which, with coal, constitute the four great natural products of our State. Our forests have gone, but fifty years of careful forestry may replace them. Not so with coal or oil or gas or marble or cement or kaolin or iron ore. These,

once gone, are gone forever. The result of the argument of counsel is indeed startling. The doctrines of John Marshall can never be construed to mean State suicide.

FREDERIC W. FLEITZ,
Deputy Attorney General.
HAMPTON L. CARSON,
Attorney General.
For the Commonwealth of Pennsylvania,
Defendant in Error.

Supreme Court of the United States.

No. 208—October Term, 1904.

The Delaware, Lackawanna and Western Railroad Company, Plaintiff in Error, vs. The Commonwealth of Pennsylvania. } In error to the Supreme Court of the State of Pennsylvania.

[May 15, 1905.]

The plaintiff in error brings this case here to review the judgment of the Supreme Court of Pennsylvania, (206 Penn. 645,) in favor of that State on a question raised by the plaintiff in error as to its liability to taxation by the State, upon certain coal of the value of $1,702,443, belonging to the plaintiff in error, which had been mined in Pennsylvania, and which, prior to the appraisement of the value of the capital stock of the company, pursuant to the Pennsylvania statute, for taxation in Pennsylvania, had been transported to and was situated in other States awaiting sale.

The case arises under proceedings provided for by the Pennsylvania statute for appraising, for the purposes of taxation, the value of the capital stock of corporations, such as the plaintiff in error, for the year ending in November, 1899. The statute under which the appraisement was made was passed June 8, 1891, (amendment of Act of 1889,) printed on page 229 *et seq.* of the Laws of Pennsylvania for that year. The sections of the act in question are four and five, and are reproduced in the margin.*

In appraising the value of the capital stock of the plaintiff in error, pursuant to that statute, it is contended by it that the appraising officers should have deducted from the value of the stock the value of the coal mined in Pennsylvania by the company and owned by it, but situated in

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*Sections of the Act of June 8, 1891.

Sec. 4. That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president, chairman, or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other State or Territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company, or corporation whatsoever, association or associations

other States, there awaiting sale, and beyond the jurisdiction of the State of Pennsylvania at the time the appraisement was made. This contention was overruled by the State courts.

The facts upon which the judgment rests were found by the court, and are as follows:

"1. The Delaware, Lackawanna and Western Railroad Company was organized under the special act of the general assembly of Pennsylvania approved March 11, 1853, by the consolidation of the Liggetts Gap Railroad Company, incorporated under the act of April 7, 1832, whose name was, by the act of April 14, 1851, changed to Lackawanna and Western Railroad Company, and the Delaware and Cobbs Gap Railroad Company, incorporated by the act of April 7, 1849. Into the Delaware, Lackawanna and Western Railroad Company as formed by the merger of the Lackawanna and Western Railroad Company and the Delaware and Cobbs Gap Railroad Company were merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Coke Company, and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company. The company, as authorized by special act of Pennsylvania legislature, has its general office and treasury in the city and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy

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copartnership or copartnerships, person or persons, or in any other manner, to make a report in writing to the auditor general, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.

Second. Total authorized number of shares.

Third. Number of shares of stock issued.

Fourth. Par value of each share.

Fifth. Amount paid into the treasury on each share.

Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary, and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity, and

and sell coal and convey the same to market; and, in addition to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the auditor general made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania in New York, Illinois and other States of the value of $1,702,443, and, as already stated, no deduction was made by the auditor general in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there, have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

"There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the attorney general, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz:

"'And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,444, being

according to the best of their knowledge and belief shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the auditor general a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the auditor general and State treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned they are hereby authorized and empowered to make a valuation thereof based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership for a period of sixty days to make the report and appraisement to the auditor general as herein provided it shall be the duty of the auditor general and State treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal.

SEC. 5. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section

the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21, being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent, either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874.'

"3. The case having been submitted to the jury, a verdict was rendered as follows, viz:

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hereof, shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock, of all kinds, including common, special and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of the settlement of the account by the auditor general and State treasurer: *Provided*, That for the purpose of this act interests in limited partnership or joint-stock associations shall be deemed to be capital stock and taxable accordingly: *Provided, also*, That corporations, limited partnerships and joint-stock associations liable to tax on capital stock under this section, shall not be required to make report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right, but corporations, limited partnership and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations, organized exclusively for manufacturing purposes and actually carrying on manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain: *Provided further*, In case of fire and marine insurance companies the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock.

Tax.....	$111,250 00
Less five mills on coal, $1,702,443.00.....	8,512 21
	$102,737 79
Less payment on account.....	100,000 00
	$2,737 79
Add attorney general's commission of 5 per cent.....	136 88
Verdict for.....	$2,874 67

"The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the court as aforesaid of the defendant's liability to taxation with respect to capital stock invested in coal located outside of Pennsylvania.

"4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz:

"'Underpowers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchaser; but at certain points in other States, as, for instances, at Buffalo, N. Y., and at Chicago, Ill., the company keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois, and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the city and State of New York.

"'In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.'

"5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal-yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business, and to hold its stockholders' meeting, in the State of New York, and to have as president, directors and other officers non-residents of the State of Pennsylvania. The company is taxable upon the value of the property represented by its capital stock, and not upon the amount of the latter."

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The Supreme Court of Pennsylvania bases its decision in this case on the authority of *Commonwealth* v. *Pennsylvania Coal Co.*, (197 Penn. 551,) which it regards as controlling upon the question involved. The right to include the value of the coal in question in the valuation of the capital stock of the company is based upon the construction given by the Supreme Court of Pennsylvania to the Pennsylvania statute of 1891, and this court is concluded by that construction. (*People* v. *Weaver*, 100 U. S. 539, 541.)

The only question for this court to determine is whether, in refusing to deduct the value of the coal mined in Pennsylvania and which at the time of the appraisement was situated outside the jurisdiction of the State, from the value of the capital stock, the State court denied any right of the plaintiff in error, which was protected by the Federal Constitution.

The coal itself, when the appraisement of the value of the capital stock was made, was concededly beyond the jurisdiction of the State of Pennsylvania. It was taxable (and in fact was taxed) in the States where it rested for the purpose of sale, at the time when the appraisement in question was made. (*Brown* v. *Houston*, 114 U. S. 622.) In that case the court held that the coal was properly taxed by the State of Louisiana, though it had but lately arrived from the State of its origin, Pennsylvania, and was at the time of the taxation awaiting sale in Louisiana, and was, in fact, soon thereafter sold and taken out of the country to a foreign State. It was said that the coal, on arrival at New Orleans for the purpose of sale, at once became intermingled with the general property of the State of Louisiana, and was taxable like any other tangible property therein. In *Coe* v. *Errol*, (116 U. S. 517,) the question was relative to the validity of the tax on the lumber imposed in the State of its origin, as that State had taxed the lumber before it had actually left the State, although it was intended for transportation to another State for sale. It was held that the tax was proper, so long, and so long only, as such transportation had not yet actually commenced. After that the State had no right to tax it. In

the case at bar the coal had been transported to and was actually resting in another State for sale when the appraisement was made, and under the foregoing cases it was then intermingled with property in the foreign State where it rested and was at that time liable to taxation therein. The right of the foreign State to tax under such circumstances was again upheld in *Pittsburg & Southern Coal Co.* v. *Bates*, (156 U. S. 577,) where the coal was taxed while awaiting sale in such State. See *Kelley* v. *Rhoads*, (188 U. S. 1;) *Diamond Match Co.* v. *Ontonagon*, (Id. 82.) We must, therefore, take it as plain, under the foregoing decisions, that this coal, at the time of the appraisement of the value of the capital stock for taxation by Pennsylvania, had become intermingled with the mass of property in the other States, to which portions of it had respectively been sent, and that it was a proper subject for taxation for both State and local purposes in such States. Where the proceeds of the sale might go when the coal was sold, whether into the treasury of the company at its offices in New York City, or indirectly to the State of its incorporation, is not important. The coal had not been sold when the appraisement of the value of the capital stock was made, and at that time it was outside the jurisdiction of the State of Pennsylvania. A tax on that coal, *eo nomine*, or specifically, could not then be laid by that State, as counsel concede.

Now, was this tax, in substance and effect, laid upon the coal which was beyond the jurisdiction of Pennsylvania? The Supreme Court of Pennsylvania has held that a tax on the value of the capital stock is a tax on the property and assets of the corporation issuing such stock. (*Commonwealth* v. *Standard Oil Co.*, 101 Penn. 119, 145; *Fox's Appeal*, 112 Id. 354; *Commonwealth* v. *Delaware &c. R. R. Co.*, 165 Id. 44.) This court has also frequently held that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property that is otherwise exempt. (*Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25; *Fargo* v. *Hart*, 193 Id. 490, 498, 499.)

The cases of the taxation upon the value of the capital stock of the banks, or on a valuation equal to the amount of their capital stock paid in or secured to be paid in, as reported in 2 Black and 2 Wall., *supra*, involved the question of the taxation of United States bonds and other securities of the United States, in which the capital of the banks was invested, which were exempt from taxation; but the holding of the court was that those bonds and securities were in fact taxed by a tax upon the value of the capital of the bank, which was invested in such bonds and securities. Of course, the distinction between the capital stock of a corporation, and the shares into which it may be divided and held by individual shareholders, is borne in mind and recognized, and nothing herein

affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the corporation itself which issues it, and has nothing to do with the individual shareholder. (*Van Allen* v. *Assessors*, 3 Wall. 573; *Bank* v. *Tennessee*, 161 U. S. 134–146.)

Counsel for defendant in error find no fault with the principle stated in *Brown* v. *Houston &c.*, *supra*, and that line of cases, nor with the general proposition laid down in the other cases cited, that a tax on the value of the capital stock is a tax on the property of the corporation in which the capital is invested. They deny, however, their applicability to the facts of this case. They concede that the courts of Pennsylvania have held that tangible property, permanently located outside of the State, for the use and benefit of the corporation, and owned by it, is exempt from taxation under this statute. They also concede that it was never within the intent or the power of the legislature to impose a tax upon tangible property when held outside of the territorial limits of the State; but they insist that this tax is not *eo nomine* or specifically upon tangible property outside the State, and they contend that the State has the right to consider the value of the coal as having entered into the value of the capital stock as soon as it was mined, and that the State then had the right to treat the coal as one of the items that went into the value of the capital stock, just the same as they contend for the right to so treat the money realized from the coal upon its sale in the foreign State when it has been returned to the State and has gone into the surplus fund. The position of the defendant in error, then, is this: The tax in question is not a tax upon coal, treated as tangible property and a tangible asset specifically subject to tax, but is a tax upon the value of the capital stock of the Pennsylvania corporation at the fixed rate of five mills for each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, franchises, and property of other kinds, and that the statute in question does not impose a tax on the coal itself. Counsel do not contend that a tax on the value of the capital stock of a corporation is not a tax on its property in a certain sense, but they contend that while a tax on capital stock is a property tax, yet the property of the corporation, for the purpose of taxation, is reached through the tax imposed *directly* upon the stock, (197 Pa. 553,) and that there is a distinction between a tax on capital stock and a direct tax on personal property. Therefore tangible property situated outside the State, under the circumstances set forth in this case, is not directly taxed by a tax on the value of the capital stock, or at least there is no specific tax upon it, and the tax is not illegal. It is also said that by reason of the alleged transitory character of the coal it has never, in law, lost its original domicil, which still remains in Pennsylvania and is subject to be there included in the value of the capital stock of the corporation.

The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co.*, (122 Penn. 386.) That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual *situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign States for purposes of taxation, and in truth it was there taxed. We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it. This is not a question as between direct or indirect taxation, such as arises under the Federal Constitution when Congress lays and collects taxes by virtue of the power given it by that instrument. No question of uniformity or apportionment of taxes arises here. The question now discussed is simply whether, under this statute of the State, property of the corporation is in substance and effect taxed while it is beyond the jurisdiction of the State and is never to return. When the Federal Constitution says no tax or duty shall be laid on articles exported from any State, such articles cannot be taxed, directly or indirectly, and a tax on foreign bills of lading is void because it in effect is a tax on exports. (*Fairbanks* v. *United States*, 181 U. S. 283–289.)

So, if the State cannot tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.

We think the State court is right in deducting, as it does, the value of the tangible property, when permanently held in another State, and we think that for the same reason the same rule should obtain in the case of tangible property situated, as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo nomine*, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter

its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock.

Although the coal may have entered into the value of the capital stock when mined, the question is whether the value of the stock in November, 1899, when the appraisement was directed by the statute to be made, should not be decreased by deducting the value of the coal therefrom which was not in the State at the time of the appraisement. We think it should; otherwise the tax amounts in substance to a specific tax on the coal. Taking the different prices of the stock at different times in the year, and the average price thereof, and otherwise following the provisions of the statute, simply makes a way of finding the value of the stock between the 1st and 15th of November in each year. That is the material time when the value is to be ascertained, and at that time this coal was not in the State. An appraisement thus made, which includes such property, is to that extent without jurisdiction and illegal. It is true that in general an appraisement of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise, (and none could be given them by the statute,) such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment. In *Louisville &c. Ferry Co.* v. *Kentucky*, (188 U. S. 385,) the ferry company was operating a ferry across the Ohio River between Jeffersonville in Indiana and Louisville in Kentucky, under two franchises, one granted by the proper authorities of Indiana for maintaining a ferry across that river from the Indiana shore to the Kentucky shore, and the other granted by the State of Kentucky to carry on a ferry business from the Kentucky to the Indiana shore. The tax was laid by Kentucky upon the company, a part of which the company insisted was a tax upon it by reason of its ownership of the Indiana franchise, which it contended was property situated in Indiana and beyond the jurisdiction of Kentucky. The courts of Kentucky held that, under the statute, "the board of valuation and

assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio River. But under certain sections of the Kentucky statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess, or attempt to assess, the property, either tangible or intangible, which it owned in the State of Indiana." This court stated: "It thus appears from the admitted facts and from the opinion of the court below that the State board in its valuation and assessment of the franchise derived by that company from Kentucky included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the Court of Appeals, the value of the franchise of the ferry company was fixed 'as if it conducted all its business in the territorial limits of the State of Kentucky,' making no deduction for the value of the franchise obtained from Indiana." It was held that the franchise granted by Indiana to maintain a ferry from the Indiana shore was wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both was essential to a complete ferry right for transportation of persons and property across the river both ways. And each franchise was property entitled to the protection of the law. After holding that the privilege of maintaining a ferry in Kentucky from the Indiana shore to the Kentucky shore was a franchise derived from Indiana, and as that franchise was a valuable right of property, the question arose whether it was within the power of Kentucky to tax it, directly or indirectly, and this court said: "It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the board of valuation and assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise." And again: "We recognize the difficulty which sometimes exists in particular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry fran-

chise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana." And in conclusion it was said: "We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana."

It is plain that in the case at bar the coal had lost its *situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, with no intention that it should ever return to its State of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way.

The judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court

Reversed.

The CHIEF JUSTICE dissented.

True copy.]

Test:

Clerk Supreme Court, U. S.